86-339

No. 86-

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

NATIONAL GYPSUM COMPANY,
UNITED STATES GYPSUM COMPANY, AND
W. R. GRACE & CO.,

Petitioners,

v.

SCHOOL DISTRICT OF LANCASTER, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Fed. R. Civ. P. 23(b)(1)(B) provides that an action may be maintained as a class action where a risk exists that adjudication of separate actions by class members would as a practical matter impair or impede the ability of other class members in subsequent litigation to protect their interests. The questions presented for review are:

1. Do the due process clauses of the fifth and fourteenth amendments require a limit on punitive damages in multi-plaintiff product liability litigation, so that equal access to such damages can best be provided through Rule 23(b)(1)(B)?

2. Did the Third Circuit apply an erroneous standard in vacating a Rule 23(b)(1)(B) certification where the district court found a "substantial possibility" that early awards of punitive damages, in a case involving thousands of potential claimants nationwide, would impair subsequent claims?

3. May a district court properly certify a nationwide Rule 23(b)(1)(B) mandatory class for punitive damages?

Fed. R. Civ. P. 23(b)(2) provides that an action may be maintained as a class action when the party opposing the class has refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate. **Fed. R. Civ. P. 23(c)(4)(A)** provides that an action may be maintained as a class action with respect to particular issues. The question for review is:

Is certification of a class under Rules 23(b)(2) and (c)(4)(A) proper for binding resolution of factual issues common to all claims in multi-plaintiff product liability litigation by declaratory judgments, even though the primary relief claimed by class members is monetary damages?

LIST OF PARTIES

The parties to the proceedings below were the petitioners National Gypsum Company, United States Gypsum Company, and W. R. Grace & Co., and the following respondents:

1. The plaintiffs who filed the three class action complaints and the nationwide class of school districts they represent. The named plaintiffs are School District of Lancaster, PA; Manheim Township School District, PA; Lampeter-Strasburg School District, PA; Board of Education of the Memphis City School, TN; Napa Valley Unified School District, CA; and Barnwell School District No. 45, SC. Barnwell was an appellant/cross-appellee in the court of appeals; the other class representatives were appellees. They represent a nationwide class comprising all public and private, elementary and secondary schools, defined more specifically as follows:

> All entities which own or operate in whole or in part any public educational facilities, as defined in Section 198(a)(10) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2854, throughout the United States; and all entities which own or operate in whole or in party any non-public, non-profit elementary or secondary educational facilities, including entities with religious affiliations, in the United States, to the extent that such non-profit entities are owned or operated by one or more non-profit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

Certain class members appeared in the courts below, including three that were enjoined from litigating individually their punitive damages claims outside the class action —Spartanburg County School District No. Seven, SC, and the Boards of Education of Anderson County and Johnson County, TN — and other class members that intervened to oppose mandatory class certification, including: Anchorage School District, AK; Cinnaminson Township Board of Education, NJ; Board of Education of the City of Clifton, NJ; Boards of Education of Hawkins County, Knox County, Knoxville City, and Loudon County, TN;

Columbus Board of Education, OH; Los Angeles Unified School District, CA; City of New York and Board of Education of the City School District of the City of New York, NY; Mayor and City Council of the City of Baltimore, MD; Lancaster County Area Vocational-Technical Schools, PA; and San Jose Unified School District, CA.

2. The 53 companies, named as defendants in one or more of the class action complaints, other than petitioners. These companies may be divided into three groups: (a) those that opposed class certification in the court of appeals — Armstrong World Industries, Inc., Asbestos Corporation, Ltd., Bell Asbestos Mines, Ltd., Carey-Canada, Inc., Dana Corp., Fibreboard Corporation, Flintkote Company, Forty-Eight Insulations, Inc., GAF Corporation, H. K. Porter Co., Lac D'Amiante Du Quebec, Ltee., Owens-Corning Fiberglas Corporation, Pittsburgh Corning Corp., Raymark Industries, Inc., Southern Textile Corp., The Celotex Corporation, Uniroyal, Inc., U.S. Mineral Products Co.; (b) those that took no position in the court of appeals — ACandS, Inc., Asten Group, Inc., Benjamin Foster Co. (Division of Amchem Products), Brinco Mining Ltd. (Formerly known as Cassiar Resources Ltd.), C. Tennant & Sons, Combustion Engineering, Inc., Eagle-Picher Industries, Inc., Empire Ace Insulation Manufacturing Corp., Georgia-Pacific Corp., Huxley Development Corp., J. W. Roberts, Ltd., Kaiser Cement Corporation, Keene Corp., Nicolet Industries, Owens-Illinois Corp., Pfizer, Inc., Proko Industries, Inc., Rock Wool Manufacturing Co., Inc., Standard Insulation, Inc., Turner Asbestos Fibres, Ltd., Turner & Newall Limited, Union Carbide Corp., Wilkin Insulation Co.; and (c) those that have not yet entered their appearance in this litigation — Asbestospray Corp., Asbestos Fibres, Inc., Bes-Tex, Inc., Cape Asbestos, Sprayed Insulation, Inc., Sprayo-Flake Company, Sprayon Insulation & Acoustics, Inc., Sprayon Research Corp., and Worben Co., Inc.

RULE 28.1 LIST

Pursuant to Rule 28.1 of the Rules of the Supreme Court, the petitioners herein make the following statements disclosing parents, non-wholly owned subsidiaries and affiliates:

National Gypsum Company:
Aancor Holdings, Inc.
Compagnie du Platre
Valley Office & Industrial Park, Inc.

United States Gypsum Company:
101 South Wacker Co.
A. Lynn Thomas Company, Incorporated
A.P. Green Refractories Co.
A.P. Green Refractories Limited
Bigelow-Liptak Corporation
Bigelow-Liptak Export Corporation
Bigelow-Liptak of Canada, Limited
Brisco Mining, Ltd.
Canadian Gypsum Company, Limited
CIKSA, S.A. de C.V.
C.N.G. Distribution Limited
Compania Mexicana de Este, S.A.
Construcciones, Recubrimientos Y Acabados
C-S-W Drywall Supply Company
Darswan, Inc.
E.J. Bartells Company
Fundy Gypsum Company, Limited
Gypsum Communications Company
Gypsum Energy Management Company
Gypsum Transportation Limited
L & W Supply Corporation
Liptak Bradley Limited
Little Narrows Gypsum Company Limited
Marbrite Manufacturing Corp.
Marstrat, Inc.
Masonite Corporation
Metropolitan Refractories Corporation
North Baldwin Park Corporation

Panama Gypsum Company, Inc.
Panama Wallboard, Inc.
Sequoyah Carpet Corporation
Stocking Specialists, Inc.
United States Gypsum Export Company
United States Gypsum Urban Development Corporation
USG Acoustical Products Company
USG Corp.
USG de Puerto Rico, Inc.
USG Foreign Investments, Ltd.
USG Industries, Inc.
USG International, Ltd (DISC)
USG Properties, Inc.
Westbank Planting Company
Windsor Shipping Limited
Wiss, Janney Elstner Associates, Inc.
Yesco Panamericano, S.A. de C.V.

W. R. Grace & Co.:
Agracetus
Axial Basin Ranch Company
AWI
Bison Nitrogen Products Co.
Business Data Services, Inc.
CFF Beverage Company
Colowyo Coal Company
Del Taco Corporation
Duke Transportation Inc.
El Torito Restaurants, Inc.
EMAbond Inc.
E.T. Beverage Company, Inc.
Four Corners Mine
Ft. Meade Chemical Products
GHL Management, Inc.
Grace-Feldmuehle Motor Ceramics Company
Grace Ventures Partnership One
H-G Coal Company
Hughes Drilling Fluids
J. T. Beerage Inc.

The L.C.S. Beverage Company, Inc.
Monolith Enterprises, Incorporated
Mountain View Insurance Company
National Medical Care, Inc.
Oklahoma Nitrogen Co.
Paramount Coal Company
Pursue Gas Processing and Petrochemical Company
S & H Beverage Co., Inc.
Soft Kat, Inc.
Taco Villa, Inc.
T&D Beverage, Inc.
TAG Pharmaceuticals, Inc.
The Fono Ice Cream Company
Productora de Papelas S.A.
Feldmuehle - Grade Noxeram G.m.b.H.
Darex Kabushiki Kaisha
Fugi-Davison Chemical Ltd.
Nippon Belt Kogyo K.K.
Teroson K.K.
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Trinidad Nitrogen Co., Limited
Dunbee-Elm Ltd.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

NATIONAL GYPSUM COMPANY,
UNITED STATES GYPSUM COMPANY, AND
W. R. GRACE & CO.,

Petitioners,

v.

SCHOOL DISTRICT OF LANCASTER, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners National Gypsum Company, United States Gypsum Company, and W. R. Grace & Co. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in *In re School Asbestos Litigation* on May 1, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, concerning the propriety of class certification, is reported at *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), and appears at p. A-4 of the appendix ("App.").

The opinion of the United States District Court for the Eastern District of Pennsylvania entering the order of class certification is reported at *In re Asbestos School Litigation*, 104 F.R.D.

422 (E.D. Pa. 1984), reprinted at p. A-52 of the appendix. The memorandum accompanying Pretrial Order No. 52, restraining a class member from separately litigating punitive damages, is reported at *In re Asbestos School Litigation*, 620 F. Supp. 873 (E.D. Pa. 1985), reprinted at p. A-85 of the appendix.

JURISDICTION

The Third Circuit filed its opinion and accompanying judgment on May 1, 1986 (App. A-4, A-41) and denied rehearing and rehearing in banc on June 2, 1986 (App. A-51). This petition is filed within ninety days of the denial of rehearing. Jurisdiction in this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, COURT RULES, AND STATUTE INVOLVED

The due process clauses of the fifth and fourteenth amendments to the Constitution, Rule 23(a), (b)(1)(B), (b)(2), and (c)(4)(A) of the Federal Rules of Civil Procedure, and the Anti-Injunction Act, 28 U.S.C. § 2283, are set forth at pp. A-1 to A-3 of the appendix.

STATEMENT OF THE CASE

More than 14,000 school buildings in the United States have asbestos-containing products.[1] To date, more than 300 school districts have filed suit in 16 federal district courts and 27 state courts to hold the sources of those products liable for their removal.

All the school district cases are product liability actions seeking to compel defendant miners of asbestos and manufacturers of asbestos-containing products to remove, contain, or repair the products ["abatement"] or to reimburse school districts for their abatement costs. The complaints each allege that the presence of asbestos in school buildings creates an unacceptable health hazard making abatement imperative and that the defendants are liable, either at law or in equity, for abatement. Most also seek punitive damages. The present actions, filed in the United States District Court for the Eastern District of Pennsylvania pursuant to the court's diversity jurisdiction, 28 U.S.C. § 1332, are three of those cases.

Recognizing the need for a bold procedural response to this massive litigation, the district court certified a national class of all public and private elementary and secondary schools throughout the country. With respect to punitive damages, the district court certified a mandatory (*i.e.*, non opt-out) class pursuant to Fed. R. Civ. P. 23(b)(1)(B). With respect to the complaints' other claims, the district court refused to certify a mandatory class pursuant to Fed. R. Civ. P. 23(b)(2), certifying instead the more common (b)(3) opt-out class. 104 F.R.D. 422 (App. A-52).

The basis for mandatory certification is set forth in the district court's initial certification opinion and in a subsequent opinion enjoining an individual class member from separately

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1. The courts below (789 F.2d at 1000 (App. A-14); 104 F.R.D. at 428 (App. A-59)), referred to the estimate of 14,000 schools reported in U.S. Dep't of Ed., *Asbestos in the Schools: A Report to the Congress* 20 (1983). The Environmental Protection Agency subsequently has estimated that there are 31,000 such school buildings. Office of Pesticides and Toxic Substances, U.S. Env. Prot. Agency, EPA 560/5-85-024, *Guidance for Controlling Asbestos-Containing Materials in Buildings* S-1 (1985).

litigating its punitive damages claim. 104 F.R.D. 422 (App. A-52); 620 F. Supp. 873 (App. A-85). The district court recognized that this litigation involved thousands of claimants and potentially millions of dollars in claims. *See* 104 F.R.D. at 425, 428 (App. A-54, A-59). Relying on district Judge Jack Weinstein's opinion in *Agent Orange*[2] and Eighth Circuit Judge Gerald Heaney's dissent in *Federal Skywalk*,[3] the district court found:

> It is apparent that there is a substantial possibility that early awards of punitive damages in individual cases will impair or impede the ability of future claimants to obtain punitive damages.

104 F.R.D. at 437 (App. A-77); *see* 104 F.R.D. at 435-36 (App. A-72 to A-74). The district court noted that punitive damages are intended to punish defendants for their wrongdoing, not to compensate plaintiffs for their injury. 104 F.R.D. at 435 (App. A-73); 620 F. Supp. at 874 (App. A-86). It found that the Constitution's due process clauses limit punishment that may be imposed on a defendant for a given course of conduct. 620 F. Supp. at 877 (App. A-90); *see* 104 F.R.D. at 435-36 (App. A-72 to A-73). Given that limit, the district court concluded that if punitive damages are allowed,

> "[I]t would be equitable to share this portion of the possible award among all plaintiffs who ultimately recover compensatory damages. Yet, if no class is certified under Rule 23(b)(1)(B), non-class members who opt-out under 23(b)(3) would conceivably receive all the punitive damages or, if their cases are not completed first, none at all."

104 F.R.D. at 435 (App. A-72), *quoting Agent Orange*, 100 F.R.D. at 728. In short, the "essence" of the mandatory class

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2. *In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied sub. nom. In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

3. *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982).

certification for punitive damages was "fairness to the defendants as well as to the plaintiffs." 620 F. Supp. at 874 (App. A-86); *see* 104 F.R.D. at 435-38 (App. A-72 to A-77).

Because the district court concluded that the ability to bind individual litigants was necessary to the certifying court's jurisdiction over the mandatory class, it adopted the analysis of the dissent in *Federal Skywalk* that mandatory class certification was not barred by the Anti-Injunction Act. 104 F.R.D. at 436 (App. A-74).

With respect to claims for equitable and compensatory relief, the court certified an opt-out class, premised on the predominance of common questions. 104 F.R.D. at 430-34 (App. A-64 to A-71). It recognized that the complaints seek two types of equitable relief: (1) injunctive relief in the form of abatement and (2) restitution of expenditures already incurred by schools to remedy asbestos hazards. However, it refused to grant mandatory class certification pursuant to Rule 23(b)(2) because it determined that plaintiffs were primarily seeking damages for the cost of abatement. 104 F.R.D. at 438-39 (App. A-78 to A-80). The district court did not address petitioners' argument that Rule 23(b)(2) should be utilized in conjunction with Rule 23(c)(4)(A) to resolve on a declaratory basis and in a single class action the common factual issues raised by this litigation.[4] *See id.*

Both class members and defendants sought immediate appellate review of the certification order. Petitioners sought a mandatory class on all issues; some class members, including one class representative, sought an opt-out class on all issues; and

4. Petitioners argued that declaratory relief was appropriate on common issues underlying plaintiffs' claims, including: (1) Does the level of asbestos fibers normally found in the air in school buildings in which asbestos-containing products have been installed create an unreasonable health hazard to children who attend those schools and employees who work there?; (2) What was the latest date by which class members should have known of the alleged hazard of exposure to asbestos-containing products in buildings for purposes of the statute of limitations?; and (3) What was the earliest date by which the state of medical and scientific knowledge (*i.e.*, the "state-of-the-art") concerning the alleged hazards posed by the presence of asbestos-containing products in buildings imposed a duty on defendants to test the products or warn of the alleged hazards?

some defendants opposed any class at all.[5] Five of the six class representatives supported the district court's class certification, including the mandatory punitive damages class. *See* 789 F.2d at 999 (App. A-12).

While those appeals were pending, the individual lawsuits of three class members against National Gypsum Company and United States Gypsum Company were scheduled for trial in federal district courts in South Carolina and Tennessee. Because these class members sought to litigate punitive damages in their individual actions, the district court entered orders enjoining punitive damages litigation outside the class action. 620 F. Supp. 873; Pretrial Orders Nos. 32, 52 and 56 (App. A-83 to A-93). The district court held that mandatory class certification compelled all class members to litigate their punitive damages claims in the class and prohibited individual litigation of a punitive damages claim by any class member. *See* 104 F.R.D. at 436 (App. A-74). It concluded that, by virtue of the mandatory class certification, it possessed jurisdiction over all class members to ensure a single adjudication of their punitive damages claims. 620 F. Supp. at 876-77 (App. A-90).

In issuing the second of these injunctions, the district court rejected the class member's argument that *Phillips Petroleum Co. v. Shutts*, ____ U.S. ____, 105 S. Ct. 2965 (1985), had *sub silentio* declared mandatory class actions unconstitutional:

> The caveat expressed by the *Shutts* Court in footnote three suggests possible variances of the obligations plaintiffs may be burdened with to fulfill due process where the relief sought is different than compensatory damages. . . . While claims for compensatory damages seek to make a plaintiff whole and, therefore, certain due process safeguards must be afforded the plaintiff, symmetry of the law would require no less when punitive damages are leveled against a defendant. Because punitive damages seek to punish and set an

5. Eight of the defendants that opposed any class have petitioned this Court for a writ of certiorari seeking review of the court of appeals' affirmance of the Rule 23(b)(3) class. *Celotex Corp. v. School District of Lancaster*, 55 U.S.L.W. 3114 (U.S. July 29, 1986)(No. 86-140).

> example, due process would require it be done fairly. In punitive damages actions it is the defendant which is the subject of the action, while in compensatory damages claims, it is the plaintiff's rights which are the subject of the action. I have provided for adequate representation of plaintiffs' cause, and notice will be provided. This is all that due process requires where it is the defendants' rights which are the subject of the punitive damages claims.

620 F. Supp. at 876-77 (App. A-90).

The federal district courts that heard the individual class members' claims took conflicting positions on the jurisdiction of the Pennsylvania district court to enter these injunctions. One court honored the injunction;[6] another refused to do so;[7] and the third never reached the issue.[8]

On May 1, 1986, the Third Circuit vacated the mandatory punitive damages class and affirmed the opt-out class. 789 F.2d 996 (App. A-4).[9] The court "held open the possibility" that a Rule

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6. *County of Anderson, Tennessee v. U.S. Gypsum Co.*, Civil Action No. Civ. 3-83-511 (E.D. Tenn. 1985), *appeal pending*, No. 85-5474 (6th Cir. argued April 1, 1986).

7. *Spartanburg County School District Seven v. National Gypsum Co.*, Civil Action No. 83-1744-14 (D.S.C. Aug. 5, 1985), *stay denied*, No. 85-1804 (4th Cir. Aug. 8, 1985), *stay denied*, No. A-120 (U.S. Aug. 9, 1985).

8. *County of Johnson, Tennessee v. U.S. Gypsum Co.*, Civil Action No. Civ. 2-83-262 (E.D. Tenn. 1986) (case voluntarily dismissed by plaintiff).

9. The court also vacated the three injunctions against the individual class members, on the ground that the mandatory class no longer existed. 791 F.2d 915, 918, 920 and 921 (App. A-45 to A-50). The basis for these orders was incorrect because, as petitioners informed the court of appeals, the orders appealed from were moot. Both the Spartanburg and Anderson school districts had been unsuccessful before juries on their claims for compensatory damages. *Spartanburg County School District Seven v. National Gypsum Co.*, Civil Action No. 83-1744-14 (D.S.C. 1985), *appeal pending*, No. 85-2273 (4th Cir. argued July 15, 1986); *County of Anderson, Tennessee v. U.S. Gypsum Co.*, Civil Action No. Civ. 3-83-511 (E.D. Tenn. 1985), *appeal pending*, No. 85-5474 (6th Cir. argued April 1, 1986). Johnson County had voluntarily dismissed its individual case. *County of Johnson, Tennessee v. U.S. Gypsum Co.*, Civil Action No. Civ. 2-83-262 (E.D. Tenn. dismissed 1986).

23(b)(1)(B) punitive damages class might be appropriate in certain circumstances. *Id.* at 1008 (A-32). Nevertheless, it rejected the district court's attempt to certify such a class in this case because it believed the district court articulated an insufficient basis to invoke due process limits on punitive damages and because it felt the class did not include all potential punitive damages claimants. *Id.* at 1005-07 (App. A-25 to A-30). The court therefore did not reach the questions of jurisdiction and comity raised by certification of a nationwide mandatory class action. *See id.* at 1007-08 (App. A-32).

The Third Circuit affirmed the district court's denial of Rule 23(b)(2) certification on the ground that the complaints seek predominantly money damages. *Id.* at 1008 (App. A-32 to A-33). While the court upheld the finding of questions common to the class members' claims, *id.* at 1009-10 (App. A-36 to A-37), it rejected a Rule 23(b)(2) class action for resolution of these common factual issues on a declaratory basis pursuant to Rule 23(c)(4)(A), *id.* at 1008 (App. A-33).

REASONS FOR GRANTING THE WRIT

I. ONLY THIS COURT CAN PROVIDE A NATIONWIDE SOLUTION TO A NATIONWIDE PROBLEM BY RULING THAT A MANDATORY CLASS ACTION SHOULD BE USED IN MASS PRODUCT LIABILITY LITIGATION TO ELIMINATE MULTIPLE LITIGATION OF COMMON QUESTIONS AND TO RESOLVE MULTIPLE PUNITIVE DAMAGES CLAIMS.

The Third Circuit's denial of mandatory class certification has erroneously deprived petitioners of a cost-efficient single adjudication of their liability for the sale of asbestos-containing products for use in school buildings. The affirmance of the Rule 23(b)(3) class does not provide the needed single forum because of the likelihood that large numbers of school districts will exclude themselves from the class. Thus, with school authorities throughout the country abating asbestos to allay fears concerning the presence of a carcinogen in the classroom, petitioners now face, as a result of the Third Circuit's decision, the prospect of

repeatedly litigating identical factual issues in countless state and federal courts throughout the country, with inconsistent procedural orders, duplicative discovery, and repetitious and expensive trials. (See Point IV *infra*). Moreover, the Third Circuit's judgment, as a practical matter, subjects petitioners to numerous and conflicting punitive damages claims, even though any such awards threaten to deprive petitioners of their due process right not to be excessively and repeatedly punished, and may result in a race to the courthouse by school districts seeking to obtain an early and larger slice of any punitive damages pie. (See Point II *infra*).

The decision in the *School Asbestos Litigation* reifies the problems experienced by courts in all multi-plaintiff product liability litigations. Since the early 1970's, such litigation, in which hundreds of victims claim to have been injured by exposure to a single product, has inundated the American judicial system.[10]

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10. About 10,000 new product liability cases were filed in the federal courts in 1984. Administrative Office of United States Courts, *1984 Annual Report of the Director of the Administrative Office of the United States Courts* 133. The number of such cases filed in federal courts more than doubled between 1978 and 1983, and increased an additional 20 percent the next year. *Id.* at 131; Administrative Office of United States Courts, *1983 Annual Report of the Director of the Administrative Office of the United States Courts* 122, 129-31.

The asbestos litigation is a prime example of the court-clogging power of mass tort litigation. The Rand Corporation's Institute for Civil Justice recently estimated the total number of pending asbestos personal injury claims at 33,000. D. Hensler, W. Felstiner, M. Selvin & P. Ebener, *Asbestos in the Courts — The Challenge of Mass Toxic Torts* 24 (Institute for Civil Justice, Rand Corp., 1985). Moreover, the pool of potential claimants shows no signs of diminishing. Conservative estimates of the number of American workers exposed to asbestos range between 8 million and 13 million individuals. Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by the Asbestos Litigation*, 36 Vand. L. Rev. 573, 580 n. 13 (1983). New categories of victims have surfaced, including warehouse workers, truck drivers, and spouses of asbestos workers. School districts and other building owners have joined the ranks of asbestos claimants. The Environmental Protection Agency estimates that 31,000 schools and approximately 733,000 commercial buildings contain asbestos. *Guidance for Controlling Asbestos-Containing Materials in Buildings, supra* note 1, at S-1.

The cases involve hundreds of claimants and billions of dollars of potential damages[11] and threaten the solvency of major corporations.[12]

As recognized by district Judge Spencer Williams, who sought unsuccessfully to utilize a mandatory class action in the *Dalkon Shield* litigation,[13] mass tort litigation presents the nation with jurisprudential questions that "transcend mundane concerns of calendar management and court congestion":

> To what extent, if any, must the litigation preferences of each of the thousands of plaintiffs in a "big case" yield to a more socially optimal, cost-efficient form of representative adjudication? Is our traditional model, pitting one plaintiff's gladiator against one defendant's gladiator, an outmoded and overly expensive means to redress similar injuries inflicted by the same misconduct upon multiple plaintiffs? Must there be dollar-by-dollar liability accumulated by society's producers until the business, or even an entire industry, is forced into bankruptcy or, is it more sensible to have a forum in which all potential ramifications upon workers, owners and the future course of product development

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11. It has been estimated that the average cost of abatement is $100,000 per school building. U.S. Dept. of Ed., *Asbestos in the Schools: A Report to the Congress* 27 (1983). Based upon the EPA's estimate of 31,000 asbestos-containing school buildings in the United States (see note 10 *supra*), the total cost of abatement for the nation's schools is approximately $3.1 billion.

12. The manufacturer of the Dalkon Shield and five companies that previously mined asbestos and manufactured asbestos-containing products have filed petitions in bankruptcy. *In re A.H. Robins Co., Inc.*, No. 85-01307-R (E.D. Va.); *In re Standard Insulation, Inc.*, No. 86-03413-KMS-11 (W.D. Mo.); *In re Forty-Eight Insulations, Inc.*, No. 85-B-5061 (N.D. Ill.); *In re Johns-Manville Corp.*, Nos. 82-B-11656 – 82-B-11676 (S.D.N.Y.); *In re Amatex Corp.*, No. 82-05220K (E.D. Pa.); *In re UNR Industries, Inc.*, Nos. 82-B-9841—82-B-9851 (N.D. Ill.).

13. *In re Northern District of California Dalkon Shield IUD Products Liability Litigation*, 521 F. Supp. 1188 and 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

> of the court's decision are aired? Must a single defendant be subjected to numerous and conflicting punitive damages awards, even when such awards threaten, as a legal or practical matter, to deprive future litigants of such recovery, or any recovery at all?

Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 324-25 (1983).

These problems are presented in this case as in every mass product liability case. To resolve these problems in this case, and by example in others, this Court must establish that a mandatory class action should be used to decide the common factual issues, including punitive damages claims, in mass product liability litigation. This Court should grant certiorari for that purpose.

II. THE THIRD CIRCUIT ERRONEOUSLY FORECLOSED USE OF RULE 23(b)(1)(B) TO RESOLVE DUE PROCESS PROBLEMS POSED BY PUNITIVE DAMAGES IN MULTI-PLAINTIFF PRODUCT LIABILITY LITIGATION, THEREBY PERPETUATING CONFUSION AMONG THE CIRCUITS ON THIS ISSUE.

Almost twenty years ago, in one of several hundred cases filed by persons who developed cataracts from taking MER/29, Judge Henry Friendly wrote:

> We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967). Since then, courts have searched for procedures to avoid "[u]nlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims." *Federal Skywalk*, 680 F.2d at 1188 (Heaney, J., dissenting).

The district court's Rule 23(b)(1)(B) class was such a procedure. It protected defendants' due process right to be free of unlimited punishment and ensured equitable treatment for the

nation's school districts. 620 F. Supp. at 875 (App. A-88). The Third Circuit acknowledged that due process limits on punitive damages may justify a mandatory class but rejected the district court's application of that principle to thousands of potential school district claimants, each seeking punitive damages for the same course of conduct. It found an insufficient factual basis for the district court's conclusion that a "substantial possibility" existed of reaching the due process limit on punitive damages in this setting. 789 F.2d at 1005 (App. A-25).

This holding was error. By granting certiorari to correct it, this Court can establish that, when hundreds of claimants seek large individual punitive damages awards, a court may use Rule 23(b)(1)(B) to enforce due process limits on multiple punishment for the same act or series of acts. It can thereby rectify the confusion created by the several courts of appeals that have considered this issue.[14]

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14. The court of appeals' suggestion of the underinclusiveness of the Rule 23(b)(1)(B) class should not be an impediment to this Court's granting certiorari on the issues urged by petitioners. "Underinclusiveness" is simply another way of saying that a proper predicate for a due-process based class does not exist. Accordingly, the question of the proper scope of the class is itself one worthy of the Court's consideration.

Moreover, the court of appeals' underinclusiveness analysis is plainly erroneous. First, it ignores the fact that, since punitive damages are not compensation, no plaintiffs, including the class members, are entitled to receive them. Second, the fact that the class could have been defined in different ways does not mean that a class of school districts would not be a useful tool in protecting defendants' due process rights. Third, the decision ignores the likelihood that had certification been affirmed, other courts would have certified similar classes of other asbestos claimants; class actions have already been filed on behalf of universities, hospitals, lessors of buildings to the federal government, public building owners, and homeowners, and a Rule 23(b)(3) class has been certified on behalf of personal injury claimants in reliance on the district court's ruling here. *Jenkins v. Raymark Industries, Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986). While a single class of all asbestos claimants might best protect defendants' rights and the claimants' ability to all share in the damages pool, the district court certainly would not have abused its discretion in concluding that a small number of classes would better protect the interests of all parties than would the alternative of thousands of separate lawsuits.

Even assuming the court of appeals was correct in believing the certified

This Court has repeatedly recognized that the due process clauses of the fifth and fourteenth amendments protect against undue punishment in civil proceedings. *See, e.g., Allen v. Illinois*,____U.S.____, 106 S. Ct. 2988 (1986); *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979). It has also consistently acknowledged that punitive damages are a deterrent, intended to punish a tortfeasor rather than to compensate its victim. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979). They are therefore a form of civil punishment. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

At its last Term, this Court acknowledged that the constitutionality of punitive damages under the eighth and fourteenth amendments "raise[s] important issues which, in an appropriate setting, must be resolved." *Aetna Life Ins. Co. v. Lavoie*,____ U.S. ____, 106 S. Ct. 1580, 1589 (1986). Courts have repeatedly concluded that punitive damages awards in multi-plaintiff product liability litigation implicate the due process clauses.[15] The

class to be underinclusive, it should have remanded for further proceedings concerning the possibility of expanding the class. *Cf. In re Bendectin Products Liability Litigation*, 749 F.2d 300, 306 (6th Cir. 1984) (proper response to district court's failure to make sufficient findings of fact to support Rule 23(b)(1)(B) certification ordinarily would be to remand for fact finding). Because the underinclusiveness analysis is premised on Fed. R. Civ. P. 19, the court of appeals should have remanded to determine whether the named school districts would adequately represent other asbestos claimants, thereby making joinder feasible, or, if not, whether the prejudice to class members collectively is greater by allowing individual school districts to pursue punitive damages in a race to verdict or by permitting the class to proceed without other asbestos claimants.

15. *See, e.g., School Asbestos Litigation*, 789 F.2d at 1004-05 (App. A-25); *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1571 (6th Cir. 1985), *cert. denied*,____ U.S.____, 106 S. Ct. 3335 (1986); *Agent Orange*, 100 F.R.D. at 728; *Dalkon Shield*, 526 F. Supp. at 898; *Maxey v. Freightliner Corp.*, 450 F. Supp. 955, 962 (N.D. Tex. 1978), *aff'd*, 623 F.2d 395 (5th Cir. 1980), *aff'd in part and vacated in part en banc*, 665 F.2d 1367 (5th Cir. 1982); *see also Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 526 (5th Cir. 1984), *vacated in part en banc*, 750 F.2d 1314 (5th Cir.), *questions certified*, 757 F.2d 614 (5th Cir.), *certification denied*, 469 So. 2d 99 (Miss. 1985), *subsequent opinion*, 781 F.2d 394 (5th Cir.), *cert. denied*,____ U.S.____, 106 S. Ct. 3339 (1986) ("[e]xcessive punishment . . . antithetical to . . . objectives"

opinions of commentators reflect this conclusion.[16]

A defendant may, consistent with the due process clauses, be punished through damages awards for a wrongful act or series of acts. This punishment may be based on the egregiousness of the defendant's conduct and its net worth, but may be neither

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NOTES *(Continued)*

of punitive damages); *Roginsky*, 378 F.2d at 839 ("legal difficulties" posed by multiple punitive awards "staggering"); *Fischer v. Johns-Manville Corp.*, No. A-66, slip op. at 35 (N.J. Sup. Ct. July 31, 1986) (available on LEXIS, States library, NJ file) ("there should be some limits placed on the total punishment exacted from a culpable defendant"); *State ex rel. Young v. Crookham*, 290 Or. 61, 72, 618 P.2d 1268, 1274 (1980) ("[t]his court appreciates the theoretically onerous effect of multiple punitive damages on a defendant"); *but see Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036 (5th Cir. 1984), *cert. denied*, _____ U.S. _____, 105 S. Ct. 1739 (1985) (multiple punitive damages awards do not violate double jeopardy protections of Constitution).

16. *See, e.g.*, Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1197 (1931)("[c]ourts have shown a disposition to say that punitive damage admonition is not punishment in order to steer clear of constitutional inhibitions against double punishment . . . which must result in the evils which the constitutional provisions are planned to avoid"); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 50 (1982) (firm judicial control over punitive damages "may well be necessary to prevent such awards from violating a corporation's due process rights"); Putz & Astiz, *Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?*, 16 U.S.F.L. Rev. 1, 40 (1981) ("to permit the opt-out plaintiff to assert a claim for punitive damages after the class claim for punitives has been settled or adjudicated subjects the defendant to the threat of multiple punishment for the same conduct in violation of the fundamental fairness guaranteed by due process"); Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 Drake L. Rev. 195, 244 (1977-1978) (argument that punitive damages should not be imposed without constitutional safeguards is "not wholly without merit"); Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing The Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37, 55 (1983) ("The aggregate of multiple [punitive] awards, however, can reach a level so fundamentally unfair and destructive that any additional awards above that level should not be permitted"); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Val. L. Rev. 269, 272 (1983) ("punitive damages defendants should have the protection of the fourth and fifth amendments, together with at least some sixth amendment rights"); Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 Harv. L. Rev. 1143, 1145 n.7 (1983) ("repetitive punishments for a single course of conduct violates basic norms of fairness").

perpetual nor excessive.[17] While a defendant's due process right not to be excessively punished may be protected in a single-plaintiff case by the court's review of the jury's verdict, in mass tort litigation this simple control is not available.

Accordingly, judges,[18] together with an impressive number of scholars,[19] have endorsed the Rule 23(b)(1)(B) class as an appropriate — and perhaps the sole effective — procedural mechanism for resolving the punitive damages problem in mass tort

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17. Petitioners do not argue here that due process prohibits imposition of any punitive damages in mass product liability cases as was done in *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985), *cert. denied*, ___ U.S. ____, 106 S. Ct. 3335 (1986) and *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) (en banc) and 781 F.2d 394 (5th Cir.) (en banc), *cert. denied*, ____ U.S. ____, 106 S. Ct. 3339 (1986).

18. *E.g.*, *School Asbestos Litigation*, 789 F.2d at 1008 (App. A-32); *Bendectin*, 749 F.2d at 306; *In re Northern District of California Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *Federal Skywalk*, 680 F.2d at 1186 (Heaney, J., dissenting); *Agent Orange*, 100 F.R.D. at 728; *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 658-59, 437 N.E.2d 910, 913 (1982), *rev'd on other grounds*, 98 Ill. 2d 324, 456 N.E.2d 131 (1983); *Fischer v. Johns-Manville Corp.*, No. A-66, slip op. at 32-33 ("Perhaps the most likely solution to the problem of cumulative punitive damages lies in the use of a class action for those damages"); *see also Acosta v. Honda Motor Co.*, 717 F.2d 828, 838 (3d Cir. 1983); *Roginsky*, 378 F.2d at 839 n.11; *Campus Sweater & Sportswear Co. v. M. B. Kahn Constr. Co.*, 515 F. Supp. 64, 110 n.131 (D.S.C. 1979), *aff'd without opinion*, 644 F.2d 877 (4th Cir. 1981); *Unified School District v. Celotex Corp.*, 6 Kan. App. 2d 346, 355, 629 P.2d 196, 206 (1981); *Martin v. Johns-Manville Corp.*, 322 Pa. Super. 348, 369 n.18, 469 A.2d 655, 666 n.18 (1983), *rev'd on other grounds*, 508 Pa. 154, 494 A.2d 1088 (1985); *State ex rel. Young v. Crookham*, 290 Or. at 67-68, 618 P.2d at 1272.

19. *See, e.g.*, Seltzer, *Punitive Damages in Mass Tort Litigation*, 52 Fordham L. Rev. at 61, 72-73; Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269; Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323; Wright, *The Successful Use of the Class Action Device*, 52 U.M.K.C.L. Rev. 141, 144-435 (1984); Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 Harv. L. Rev. at 1157; Note, *Class Actions for Punitive Damages*, 81 Mich. L. Rev. 1787 (1983); Note, *The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishment*, 1984 U. Ill. L. Rev. 153 (1984); *see also* Restatement (Second) of Torts § 908, comment e ("[i]n a class action, involving all claims, full assessment of the punitive damages can be made").

litigation. They reason that due process limits on punitive damages awards in multi-plaintiff litigation create a risk that some claimants may be denied equal access to such punitive damages — by jury consideration of prior awards, by remittitur, or by a ban on further punitive judgments; accordingly, the risk of impairment described in Rule 23(b)(1)(B) is present.

At least five district courts, including the one below, have certified punitive damages classes on this basis. The reviewing appellate courts, including the Third Circuit here, while all recognizing that a mandatory punitive damages class would be appropriate in some circumstances,[20] have divided on when the "proper circumstances" for mandatory certification exist. The appellate courts disagree about both the legal basis for a mandatory class and the factual showing necessary to sustain certification.

Some courts have reasoned (as did the district court in this case) that if a class involves hundreds of claimants nationwide and a manifest potential for large punitive damages awards, due process justifies mandatory class certification because the scope of the litigation creates the "probable risk" of multiple punishment. *See Diamond Shamrock*, 725 F.2d at 861-62 (upholding on mandamus Judge Weinstein's due-process-based mandatory class in *Agent Orange*); *Federal Skywalk*, 680 F.2d at 1188 (Heaney, J.,

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20. *School Asbestos Litigation*, 789 F.2d at 1008 (A-32), *rev'g*, 104 F.R.D. 422 ("we hold open the possibility of a 23(b)(1)(B) punitive damage class in more appropriate circumstances"); *Bendectin*, 749 F.2d at 306, *vacating* (b)(1)(B) settlement class in *In re Bendectin Products Liability Litigation*, MDL #486 (S.D. Ohio June 18, 1984) ("On pure policy grounds, the district judge's decision may be commendable, and several commentators have argued that Rule 23 should be used in this manner"); *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858, 862 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984), *denying mandamus in Agent Orange*, 100 F.R.D. 718 ("Given the large number of potential claimants . . . and given the fact that punitive damages ought in theory to be distributed among the individual plaintiffs on a basis other than date of trial, the arguments against his ruling does not justify issuance of a writ of mandamus"); *Dalkon Shield*, 693 F.2d at 852, *vacating* 526 F. Supp. 887 ("Rule 23(b)(1)(B) certification is proper only when separate punitive damage claims necessarily will affect later claims"); *Federal Skywalk*, 680 F.2d at 1177, *vacating* 93 F.R.D. 415 (Because the certification was held to violate the Anti-Injunction Act, 28 U.S.C. § 2283, the court explicitly failed to reach the merits of the propriety of the class).

dissenting). Others, analogizing to the limited fund concept of federal interpleader, have required a factual showing that a financial limit exists, or that individual punitive damages recovery will "necessarily" or "inescapably" affect later claims. *See, e.g., Bendectin*, 749 F.2d at 306; *Dalkon Shield*, 693 F.2d at 852; *see also LaMar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973).

The Third Circuit's opinion illustrates the conflict and the confusion it engenders for district courts[21] and litigants. The district court predicated its mandatory class on the due process limit on multiple punishment; given the scope of the litigation, it found a "substantial possibility" that the limit would be reached. 104 F.R.D. at 437 (App. A-77). The Third Circuit reversed in large part because the district court made no factual findings "as to the potential amount and scope of punitive damages." 789 F.2d at 1005 (App. A-25 to A-26). It purported to discern that requirement in the district court's opinion in *Agent Orange*. 789 F.2d at 1005 (App. A-26). Yet in *Agent Orange*, Judge Weinstein, after calculating that a financially limited fund did not exist, explicitly based his certification on the due process rationale. His holding was based on the finding of "substantial probability" (100 F.R.D. at 728) that the district court here relied on. 104 F.R.D. at 435 (App. A-72 to A-73). Judge Weinstein's class, identical in basis to the class certified below, was upheld by the Second Circuit on mandamus. 725 F.2d 858.

This confusion over standards, so long as it exists, eviscerates the use of Rule 23(b)(1)(B) to resolve the multi-plaintiff punitive damages problem, despite universal approval in principle of the procedure. By erroneously rejecting the district court's basis for mandatory certification, the Third Circuit has exacerbated a situation that only this Court can remedy. The Court should grant certiorari to establish that Rule 23(b)(1)(B) can be used to protect due process rights when hundreds of claimants

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21. *See In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 713-14 (E.D. Mich. 1985), for an example of the difficulties encountered by a trial court in determining the standard to be applied on a motion for Rule 23(b)(1)(B) certification.

seek punitive damages for the same act or series of acts and thereby provide equal access to all claimants to any awards of punitive damages.

III. CONSTITUTIONAL OR STATUTORY BARRIERS OUGHT NOT BE CREATED TO INHIBIT CERTIFICATION OF A MANDATORY PUNITIVE DAMAGES CLASS.

As the Third Circuit recognized, certification of a mandatory class on punitive damages raises serious questions of jurisdiction and federalism, involving both the due process clauses and the Anti-Injunction Act, 28 U.S.C. § 2283. 789 F.2d at 1007-08 (App. A-32). The district court believed that despite the absence of the opportunity for class members to opt out, its mandatory certification comported with due process. 620 F. Supp. at 876-77 (App. A-89) (enjoining class member from individually litigating punitive damages). Similarly, it held that although injunctive in character, mandatory certification did not violate the Anti-Injunction Act, contrary to the Eighth Circuit's decision in *Federal Skywalk*. 104 F.R.D. at 436 (App. A-74).

Accordingly, should this Court determine that the Third Circuit improperly vacated the district court's certification of the mandatory punitive damages class, this case will present the question whether constitutional or statutory limitations prohibit that certification on a nationwide basis. Should this Court grant certiorari to review the propriety of the punitive damages class, it can simultaneously establish that mandatory certification violates neither the due process clauses nor the Anti-Injunction Act.

In *Phillips Petroleum Co. v. Shutts*, ___ U.S. ___, ___, 105 S. Ct. 2965, 2975 (1985), this Court held that in actions "for money damages or similar relief at law," a state court satisfies due process if it provides absent plaintiffs with 1) notice and an opportunity to be heard; 2) an opportunity to opt out of the class, or minimum contacts with the forum; and 3) adequate representation. Rule 23 requires neither notice nor the right to opt out of a mandatory class. This petition raises the question left unanswered in *Shutts*: whether the due process requirements

imposed by that decision are appropriately limited to the type of class at issue there or whether they apply equally to a mandatory class action.[22]

Significant differences exist among the Rule 23 classes. Opt-out classes under Rule 23(b)(3) — the exact analogue of the class in *Shutts* — are in effect "super-joinder" devices, designed only to provide a more efficient means of managing complex or unwieldy litigation. 3B J. Moore, *Moore's Federal Practice* ¶ 23.45[1] (2d ed. 1985). Mandatory classes, certified under Rules 23(b)(1) and (b)(2), serve significant additional equitable interests; they ensure fairness to absent plaintiffs and defendants and consistent application of a rule of law. *See* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 315 (1973).

These differences are reflected in the provisions of Rule 23. In a heterogeneous (b)(3) class, the rule requires class members be given notice and an opportunity to opt out. Fed. R. Civ. P. 23(c)(2). Because a (b)(3) class implicates no countervailing equitable interests and because individual remedial objectives may differ, it would be unfair not to respect a class member's interest in pursuing separate litigation. *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249-50 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

By contrast, Rule 23 requires neither notice nor the right to opt out of a mandatory class. This procedure reflects the equitable interests that in a mandatory class outweigh a class member's interest in individual litigation. *Wetzel*, 508 F.2d at 249-50; *accord, Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 963 n.3 (3d Cir. 1983); *see also Dosier v. Miami Valley Broadcasting Co.*, 656 F.2d 1295, 1299 (9th Cir. 1981); *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977); *Larionoff v. United States*, 533 F.2d 1167, 1185-86 (D.C. Cir.

22. In *Shutts*, the Court carefully limited its decision to classes like the one certified in that case:

> Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments. We intimate no view concerning other types of class action lawsuits, such as those seeking equitable relief.

___U.S. ___, 105 S. Ct. at 2975 n.3.

1976), *aff'd*, 431 U.S. 864 (1977); Advisory Committee Notes to 1966 Amendment to Rule 23, 39 F.R.D. 98, 106 (1966). Thus, as the Third Circuit has recognized with respect to a (b)(2) class, allowing opt-outs and separate litigation "would defeat the fundamental objective of [the mandatory class], to bind the members of the class with one conclusive adjudication." 508 F.2d at 252-53.

The language of *Shutts*, and the due process requirements it imposes, are appropriately limited to the type of class at issue there — claims for damages by heterogeneous class members, joined for reasons of efficiency, as in the typical Rule 23(b)(3) class. The mandatory punitive damages class here does not fall into that category. The "damages" involved are intended to punish defendants for wrongdoing, not to compensate plaintiffs for loss of what is rightfully theirs. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. at 266-67; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Against the interest of class members in pursuing individual litigation lie both the interest of defendants in not being excessively punished and the collective interest of plaintiffs in equitably sharing any punitive award. The class is thus cohesive in the way a (b)(3) class is not and demands a unitary adjudication of the issue that prompted its existence.

This case presents a due process challenge to the propriety of a nationwide mandatory class. Should this Court grant certiorari, it can establish that the due process requirements imposed by *Shutts* are limited to a (b)(3)-type class and that a nationwide punitive damages class properly certified under Rule 23(b)(1)(B) does not offend due process.

Similarly, this case raises the impact of the Anti-Injunction Act on a mandatory certification. In the *Federal Skywalk* case, the Eighth Circuit recognized the inherently injunctive effect of mandatory class certification; it concluded as a result that such certification violated the Anti-Injunction Act. *Federal Skywalk*, 680 F.2d at 1180, 1183. The district court here held that Judge Heaney's dissent in *Federal Skywalk* was better reasoned: because a mandatory class action can achieve its objectives only by precluding individual litigation by class members, the ability to enjoin state court proceedings is "necessary in aid of" a court's

jurisdiction over the class and therefore within an exception to the Anti-Injunction Act. 104 F.R.D. at 436 (App. A-74). By accepting certiorari, this Court can establish that the Anti-Injunction Act poses no impediment to a properly certified mandatory class.

IV. THE THIRD CIRCUIT ERRED IN REFUSING TO UTILIZE RULES 23(b)(2) AND (c)(4)(A) TO PROVIDE EQUITABLE RESOLUTION TO OTHERWISE INTRACTABLE PROCEDURAL PROBLEMS PRESENTED BY MASS PRODUCT LIABILITY LITIGATION AS EPITOMIZED BY THIS CASE.

Both the district court and the court of appeals recognized that common factual questions are present in the school districts' claims arising from the presence of asbestos-containing products in their buildings. 104 F.R.D. at 429 (App. A-61); 789 F.2d at 1009 (App. A-36). However, both courts erroneously refused to utilize Rules 23(b)(2) and (c)(4)(A) together to resolve those particular issues by the issuance of declaratory judgments binding on all school districts and all defendants. By granting certiorari, this Court can establish the propriety of this procedure to resolve common questions in multi-plaintiff product liability cases.

Such cases inevitably present a core of common questions on such issues as negligence, unreasonable danger, state-of-the-art, and the justifiability and amount of punitive damages. Litigation of those issues is truly representative and permits a trier of fact fairly to adjudicate the rights and liabilities not only of the parties before the court, but also of a host of others who are not.

This commonality has been recognized by the use of a variety of procedural devices to aggregate the claims of mass tort plaintiffs: joinder of numerous plaintiffs on a single complaint,[23]

23. *E.g.*, *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985) (the first multi-plaintiff asbestos litigation to be tried to a jury in the Eastern District of Pennsylvania); *County School Board of Amelia County, Virginia v. U. S. Gypsum Co.*, Civil Action No. 84-0022C (W.D. Va.) (an asbestos suit by eight school districts); *Dayton Independent School District v. United States Gypsum Co.*, Civil Action No. B-81-277 (E.D. Tex.) (an asbestos suit by 104 school districts); *St. Robert's Congregation v. Owens-Corning*

consolidation of cases for resolution under Rule 42(a),[24] separate trials of the issues that are common to consolidated cases,[25] and occasionally — despite the caveat of the Advisory Committee that a Rule 23(b)(3) class action is not properly certified in the "mass accident" case[26] — class actions.[27]

NOTES *(Continued)*

Fiberglas Corp., C.A. No. 647656 (Cir. Ct. Milw. WI) (an asbestos suit by 69 school districts).

24. *E.g.*, *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009 (5th Cir. 1969) (affirming the consolidation of cases alleging that plaintiffs had developed chloroquine retinopathy as a result of taking a drug manufactured by defendants); *Hawkinson v. A. H. Robins Co.*, 595 F. Supp. 1290 (D. Colo. 1984) (consolidation of cases arising from use of the Dalkon Shield IUD).

25. *See, e.g.*, *In re Bendectin Products Liability Litigation*, MDL #486 (S.D. Ohio) (consolidated trial on whether Bendectin caused birth defects); *Coursen v. A. H. Robins Co.*, Nos. 84-3854/61 (9th Cir. July 3, 1985) (consolidated trial on Dalkon Shield claims of seven women for resolution of general liability issues, with causation and damages to be tried seriatim); *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d at 485-86, 489 (a single trial to determine defendants' liability to each of 15 asbestos personal injury plaintiffs, followed by separate trials for determination of damages); *In re All Maine Asbestos Litigation* (D. Maine July 16, 1985) (reproduced in Mealey's Litigation Reports: Asbestos 2612-14 (July 26, 1985)) (consolidation of almost 100 asbestos personal injury cases and separate trial of claims under the Maine Strict Products Liability Act, 14 M.R.S.A. § 221); *In re Ohio Asbestos Litigation*, OAL Order No. 30 (N.D. Ohio Jan. 31, 1985) (a single trial on the state-of-the-art defense to numerous plaintiffs' claims); *see also In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983) (affirming the separate trial of the causation issue in the class action arising from the 1977 fire at the Beverly Hills Supper Club in Kentucky); *In re Paris Air Crash*, 69 F.R.D. 310, 323 (C.D. Cal. 1975) (ordering single trial of product liability issue raised against two defendants in 205 wrongful death actions arising out of aircraft disaster).

26. *See* Advisory Committee Notes to 1966 Amendment to Rule 23, 39 F.R.D. at 103.

27. *See, e.g.*, *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986), *aff'g* 109 F.R.D. 269 (asbestos personal injury class action); *Payton v. Abbott Laboratories*, 83 F.R.D. 382 (D. Mass. 1979), *vacated*, 100 F.R.D. 336 (D. Mass 1983) (DES class action); *Board of Education of the School District for Detroit v. Celotex Corp.*, C.A. No. 84-429034-ND (Cir. Ct. Wayne Cty. Mich. Sept. 6, 1985) (class action for Michigan school district claimants); *see also In re Federal Skywalk Cases*, 97 F.R.D. 380 (W.D. Mo. 1983) ((b)(3) class action for victims of Hyatt Regency skywalk collapse); *but see Mertens v.*

This approach should be taken a step further by interpreting Rule 23(b)(2), in conjunction with Rule 23(c)(4)(A), to allow a mandatory class action for resolving common factual questions in a mass product liability case.

Mandatory class resolution, on a declaratory basis, of the common questions raised by mass tort cases represents a refinement of the well-established principle that Rule 23 can be used effectively to resolve discrete issues underlying liability.[28] Dis-

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Abbott Laboratories, 99 F.R.D. 38 (D.N.H. 1983) (denying class certification in DES litigation); *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) (denying class certification in asbestos personal injury litigation); *Kohr v. Johns-Manville Sales Corp.*, No 78-3942 (E.D. Pa. Sept. 5, 1979) (denying certification in asbestos personal injury litigation); *McDaniel v. Johns-Manville Sales Corp.*, No. 77-C3534 (N.D. Ill. May 7, 1979) (denying certification in asbestos personal injury litigation); *Cleveland Board of Education v. Armstrong World Industries*, 22 Ohio Misc. 2d 18 (C.P. Cuyahoga County 1985) (denying statewide class action in asbestos school litigation).

28. *See, e.g., Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980) ("The fact that individuals may also seek relief on the basis of facts peculiar to their individual cases does not deflect the thrust of this lawsuit away from the constitutional questions which will ultimately determine if there is any reason to hear individual claims [at all]"); *Arthur Young & Co. v. United States Dist. Ct.*, 549 F.2d 686, 690 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977) (a securities fraud action certified for class treatment, excluding, *inter alia*, issues such as reliance or causation, the investor's knowledge of the facts allegedly misrepresented, laches, and other similar matters which required individualized treatment for determination "[u]pon individual claims to be filed within ninety days of any judgment in the [class] action in favor of the plaintiffs"); *McQuilken v. A. & R. Dev. Corp.*, 576 F. Supp. 1023, 1030 (E.D. Pa. 1983) (certifying a (b)(3) class for resolution of whether pile-driving is an abnormally dangerous activity for which liability may be imposed); *Ouellette v. International Paper Co.*, 86 F.R.D. 476 (D. Vt. 1980) (certifying a (b)(3) class for determining whether defendant's discharge of certain pollutants into the water had diminished the property value of certain riparian landowners); *Yandle v. PPG Industries, Inc.*, 65 F.R.D. at 569 (refusing to certify a class in asbestos personal injury litigation, but recognizing that a class action may properly be used in mass accident cases for the common questions that apply to each class member equally); *Environmental Defense Fund, Inc. v. Corps of Eng. of U.S. Army*, 348 F. Supp. 916 (N.D. Miss. 1972), *aff'd*, 492 F.2d 1123 (5th Cir. 1974) (resolving in a class action the propriety of construction of a navigation project).

position of litigation on a bifurcated basis using Rules 23(b)(2) and (c)(4)(A) has been used in employment discrimination cases[29] and environmental cases.[30]

In both categories of mass tort cases — product liability and accident — limited issue certification has been used to resolve common questions of liability.[31] While this approach has evoked criticism when coupled with certification of a mandatory class,[32] only a mandatory class action resulting in binding judgments on common questions can avoid repetition of the same depositions, interrogatories, document productions, and presentation of evidence.

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29. *E.g.*, *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d at 252; *Baxter v. Savannah Sugar Ref. Corp.*, 495 F.2d 437, 443-44 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 448 (5th Cir. 1973); *Nix v. Grand Lodge of Int'l Ass'n of Machinists & Aero. Wkrs.*, 479 F.2d 382, 385 (5th Cir.), *cert. denied*, 414 U.S. 1024 (1973); *Freeman v. Motor Convoy, Inc.*, 68 F.R.D. 196, 203 (N.D.Ga. 1975), *aff'd*, 700 F.2d 1339 (11th Cir. 1983); *Smith v. Missouri Pac. R. Co.*, 19 Fed. R. Serv. 2d 1044 (W.D. La. 1975).

30. *E.g.*, *Biechele v. Norfolk & Western Railway Co.*, 309 F. Supp. 354 (N.D. Ohio 1969) (certifying a (b)(2) class for determining whether a railroad's operation of its coal storage facility constituted a nuisance).

31. *See, e.g.*, *Ouellette v. International Paper Co.*, 86 F.R.D. 476 (Rule 23(b)(3) class certified to determine liability for lake pollution); *Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100 (E.D. Va. 1980) (Rule 23(b)(3) class certified to determine liability for water pollution); *Payton v. Abbott Laboratories*, 83 F.R.D. 382 (Rule 23(b)(3) class certified to resolve 13 issues in DES cases); *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977), *mandamus denied sub nom. Union Light, Heat & Power Co. v. United States Dist. Ct.*, 588 F.2d 543 (6th Cir. 1978), *cert. dismissed*, 443 U.S. 913 (1979) (Rule 23(b)(1)(A) and (B) class certified to determine liability in supper club fire); *Bentkowski v. Marfuerza Compania Maritima, S.A.*, 70 F.R.D. 401 (E.D. Pa. 1976) (Rule 23(b)(3) class certified for determination of negligence in shipboard food contamination case); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla. 1973), *aff'd*, 507 F.2d 1278 (5th Cir. 1975) (Rule 23(b)(1)(A) class certified for determination of negligence in shipboard food poisoning case); *In re Petition of Gabel*, 350 F. Supp. 624 (C.D. Cal. 1972) (Rule 23(b)(1)(A) & (B) and (b)(2) class certified for declaratory relief on liability in airplane crash).

32. *See, e.g.*, *Bendectin*, 749 F.2d at 305; *McDonnell Douglas Corp. v. United States Dist. Ct.*, 523 F.2d 1083, 1085 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

Only a mandatory class would afford both school districts and defendants the same opportunity to litigate an issue once and then utilize res judicata and collateral estoppel to preclude relitigation of the issue. For two reasons, the Third Circuit's erroneous refusal to certify a class pursuant to Rules 23(b)(2) and (c)(4)(A) provides the Court with the opportunity to decide the proper application of Rule 23(b)(2).

First, the courts below recognized the injunctive component in the school districts' class action complaints, but improperly denied Rule 23(b)(2) certification on the ground that the action was primarily for damages. Numerous commentators have urged certification of a Rule 23(b)(2) class in lieu of a Rule 23(b)(3) class whenever injunctive relief is sought by the complaint:

> Disputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award neither promote the disposition of the case on the merits nor represent a useful expenditure of energy. Therefore, they should be avoided. If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2). Those aspects of the case not falling within Rule 23(b)(2) should be treated as incidental. Indeed, quite commonly they will fall within Rule 23(b)(1) or Rule 23(b)(3) and may be heard on a class basis. Even when this is not the case, the action should not be dismissed. The court has the power under subsection (c)(4)(A), which permits an action to be brought under Rule 23 "with respect to particular issues," to confine the class action aspects of a case to those issues pertaining to the injunction and to allow damages issues to be tried separately.

7A C. Wright & A. Miller, *Federal Practice & Procedure*, Civil § 1775 at 23 (1972); *accord*, 3B J. Moore, *Moore's Federal Practice* ¶ 23.40[4] at 23-308 (2d ed. 1985); 1 H. Newberg, *Newberg on Class Actions* § 4.14 at 299 (2d ed. 1985). This Court should hold that Rule 23(b)(2) certification, because of its jurisprudential advantages, should have been utilized in this case, in preference to Rule 23(b)(3).

Second, the Third Circuit's decision raises a fundamental unanswered question about the meaning of the phrase "corresponding declaratory relief" in Rule 23(b)(2). Declaratory judgments on common factual issues in multi-plaintiff product liability cases would enable the courts to dispose of plaintiffs' claims efficiently and expeditiously by laying the basis for a subsequent damages award. This Court should determine whether declaratory relief "corresponds" to final injunctive relief not because "as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief," 7A C. Wright & A. Miller, *Federal Practice & Procedure*, Civil § 1775 at 22 (1972); but because, in the words of the Advisory Committee, it "settle[s] the legality of the defendant's behavior," *see* Advisory Committee Notes to 1966 Amendment to Rule 23, 39 F.R.D. at 102.

While some might consider the latter reading an innovative interpretation of Rule 23(b)(2), it comports with the plain language of the rule and this Court should adopt it. Rule 23(b)(2), in combination with Rule 23(c)(4)(A), has an unequalled capacity to resolve the problems posed by mass tort litigation by producing a series of declaratory orders that will bind the litigants, advance the ultimate resolution of all claims, and enhance substantive fairness. Moreover, in this case, a declaratory judgment determining whether asbestos-containing products in schools pose a hazard will not only resolve the liability of defendants but also give the nation's school districts standards concerning the need for abatement.

CONCLUSION

As the Third Circuit recognized in the decision which petitioners seek to have this Court review, "this is not a routine class action." 789 F.2d at 1001 (App. A-34). It presents in all their complexity the problems of mass product liability cases, and particularly punitive damages in multi-plaintiff litigation.

Agent Orange, asbestos, bendectin, DES, dioxin, the Dalkon Shield, and PCB have become synonymous in the minds of Americans with tragedy and suffering. In the minds of corporate America, they connote staggering legal bills and unquantifiable potential liability for compensatory and punitive damages. In the minds of bench and bar, they connote an explosion of lawsuits and accompanying delays and duplication of effort.

The federal courts are struggling to find procedures to administer and dispose of mass product liability claims efficiently and fairly. This case presents the opportunity for the Court to establish that mandatory class actions, certified pursuant to Rule 23(b)(1)(B), (b)(2), and (c)(4)(A), can be used to solve the problems in this litigation and similar mass product liability cases.

Accordingly, National Gypsum Company, United States Gypsum Company and W. R. Grace & Co. respectfully request that a writ of certiorari issue to review the judgment of the United State Court of Appeals for the Third Circuit, vacating the district court's Rule 23(b)(1)(B) class certification decision and affirming the district court's denial of Rule 23(b)(2) class certification.

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Dated: August 30, 1986

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

Text of Constitutional Provisions

The fifth amendment of the U.S. Constitution provides in relevant part:

> . . . [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The fourteenth amendment of the U.S. Constitution provides in relevant part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Text of Court Rules

Rule 23(a) of the Federal Rules of Civil Procedure provides:

> (a) *Prerequisities to a Class Action*. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(1)(B) and (2) of the Federal Rules of Civil Procedure provides:

> (b) *Class Actions Maintainable*. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of . . .
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

Rule 23(c)(4)(A) of the Federal Rules of Civil Procedure provides:

> (c) . . . *Actions Conducted Partially as Class Actions*.
>
> (2) Where appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, ...

Text of Anti-Injunction Act

The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

§2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1642, 84-1643, 84-1649, 84-1651, 84-1652, 84-1670, 84-1671, 84-1672, 84-1692, 84-1693, 84-1694, 84-1695, 84-1696, 85-1243, 85-1272, 85-1287 & 85-1288

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER
MANHEIM TOWNSHIP SCHOOL DISTRICT
LAMPETER-STRASBURG SCHOOL DISTRICT
and
NORTHEASTERN SCHOOL DISTRICT

v.

LAKE ASBESTOS OF QUEBEC, LTD., THE CELOTEX CORP., RAYMARK INDUSTRIES, INC., UNION CARBIDE CORP., ASBESTOSPRAY CORP., SPRAYO-FLAKE CO., NATIONAL GYPSUM CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES, INC., DANA CORP., U.S. GYPSUM, U.S. MINERAL PRODUCTS CO., SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WORBEN CO., INC., WILKIN INSULATION CO., W.R. GRACE & CO., OWENS-CORNING FIBERGLAS CORP., STANDARD INSULATIONS, INC., NORTH AMERICAN ASBESTOS CORP., CASSIAR RESOURCES LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., TURNER & NEWALL LTD., THE FLINTKOTE CO., FIBREBOARD CORP., GAF CORP., UNIROYAL, INC., CAPE ASBESTOS, PFIZER, INC., KAISER CEMENT CORP., BES-TEX, INC., GEORGIA-PACIFIC CORP.
(D.C. Civil No. 83-0268)

BARNWELL SCHOOL DISTRICT NO. 45

v.

U.S. GYPSUM, NATIONAL GYPSUM CO., W.R. GRACE & CO., ASBESTOSPRAY CORP., SPRAYO-FLAKE CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES, INC., DANA CORP., U.S. MINERAL PRODUCTS CO., SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WILKIN INSULATION CO., TURNER & NEWALL LTD., J.W. ROBERTS, LTD., PROKO INDUSTRIES, INC., RAYMARK INDUSTRIES, INC., OWENS-CORNING FIBERGLAS CORP., STANDARD INSULATIONS, INC., SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., THE FLINTKOTE CO., FIBREBOARD CORP., UNIROYAL, INC., ROCK WOOL MANUFACTURING CO., INC., EMPIRE ACE INSULATION MANUFACTURING CORP., EAGLE-PICHER INDUSTRIES, INC., FORTY-EIGHT INSULATIONS, INC., COMBUSTION ENGINEERING, INC., GAF CORP., Lac d'AMIANTE du QUEBEC, LTEE., THE CELOTEX CORP., CAREY-CANADA, INC., UNION CARBIDE CORP., BRINCO MINING, LTD., formerly known as CASSIAR RESOURCES, LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, CAPE ASBESTOS, NORTH AMERICAN ASBESTOS CORP., TURNER ASBESTOS FIBRES, LTD., C. TENNANT & SONS, HUXLEY DEVELOPMENT CORP., ASTEN GROUP, INC., H.K. PORTER CO., NICOLET INDUSTRIES, ARMSTRONG CONTRACTING & SUPPLY CORP., BENJAMIN FOSTER CO., PITTSBURGH CORNING CORP., ARMSTRONG WORLD INDUSTRIES, INC., WORBEN CO., INC.
(D.C. Civil No. 83-1395)

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OWENS-CORNING FIBERGLAS CORP., APPELLANT IN 84-1672

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ASBESTOS CORPORATION LIMITED, APPELLANT IN 84-1694

BOARDS OF EDUCATION OF ANDERSON COUNTY, JOHNSON COUNTY, LOUDON COUNTY, KNOX COUNTY, CITY OF KNOXVILLE, AND HAWKINS COUNTY, TENNESSEE, APPELLANTS IN 84-1695

H.K. PORTER CO., SOUTHERN TEXTILE CORP., AND FORTY-EIGHT INSULATIONS, INC., APPELLANTS IN 84-1696

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued January 6, 1986

Before: WEIS, HIGGINBOTHAM, and BECKER,
Circuit Judges

Filed May 1, 1986

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OPINION OF THE COURT

WEIS, *Circuit Judge.*

In an effort to reach an equitable result in these asbestos property damage cases brought by school authorities, the district court certified a nationwide mandatory class for punitive damages and an opt-out class for compensatory damages. We conclude that the mandatory class cannot be approved because of a lack of necessary findings and for the additional reason that the class, being under-inclusive, cannot in the circumstances here accomplish the objectives for which it was created. We will, however, affirm the denial of a (b)(2) class and despite misgivings on manageability, will af-

firm the district court's conditional certification of a Rule 23(b)(3) opt-out class on compensatory damages.

The district court invoked Fed.R.Civ.P. 23(b)(1)(B) in entering the certification order designating a mandatory class for school districts seeking punitive damages and followed Rule 23(b)(3) in forming a class for those seeking compensatory damages. A request for class certification under Rule 23(b)(2) was denied.

Pursuant to 28 U.S.C. § 1292(b), the court certified that the order constituting the 23(b)(1)(B) class raised a controlling question of law respecting possible violation of the Anti-Injunction Act, 28 U.S.C. § 2283. Various parties have appealed, challenging not only that phase of the case but also the propriety of the (b)(3) certification as well as the denial of the (b)(2) request.[1]

This litigation began with the filing of class action complaints in the Eastern District of Pennsylvania by several Pennsylvania school districts and the Barnwell, South Carolina School District. The cases were consolidated soon after filing. Defendants, numbering approximately fifty, are associated with the asbestos industry as miners, bulk suppliers, brokers, assemblers, manufacturers, distributors, and at least one contractor.

As a result of federal legislation and regulation, plaintiffs are required to test for the presence of asbestos in schools.[2] The complaints seek compensatory and punitive damages as well as injunctive relief stemming from compliance with the federal legislation and

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1. Three school districts have filed related appeals challenging injunctions issued to enforce the mandatory class.

2. *See* The Toxic Substance Control Act, 15 U.S.C. § 2605 and E.P.A. regulations at 40 C.F.R. § 763.78 *et seq.* For other legislative responses to asbestos in the schools, see 20 U.S.C. § 3601 *et seq.*; 20 U.S.C. § 4011 *et seq.*

the alleged need to remove or treat materials containing asbestos. The claims are based on theories of negligence, strict liability, intentional tort, breach of warranty, concert of action, and civil conspiracy.

After a group of plaintiffs presented a motion for the formation of classes under sections (b)(1) and (b)(2) of Rule 23, the court issued an order certifying such classes but limited them to claims against three defendants which had agreed not to oppose that action. This ruling led to objections by various other plaintiffs and defendants, and the court later vacated the order in part. Arguments were then heard from all parties who split, not along the usual plaintiff-defendant lines, but into a number of unusual alignments as dictated by their perceived interests. The eventual certification order included the claims against all defendants.

In conditionally creating a mandatory class under (b)(1)(B) on the punitive damage claims, the court found "a substantial possibility that early awards of punitive damages in individual cases [would] impair or impede the ability of future claimants to obtain punitive damages." *In re Asbestos School Litigation*, 104 F.R.D. 422, 437 (E.D. Pa. 1984). Although plaintiffs had advanced the argument that the defendants' funds would be exhausted before all claimants were paid, no substantive evidence was presented demonstrating that those assets would be insufficient, and accordingly the district judge declined to address that issue. *Id.* at 434 n.15.

The court believed that a mandatory class would create an opportunity for parity of treatment by bringing all injured parties into the same forum. Nevertheless, any plaintiff who opted out of the (b)(3) class would be permitted to settle a punitive damage claim with defendants. Additional support for

certification was found in the strong "federal interest inherent in asbestos abatement" and the minimal intrusion on the interests of the school districts.

Class certification under 23(b)(2), however, was denied. The court commented that "despite the ingenuity of plaintiffs' claims for limited equitable remedies, this case remains at bottom, one for legal damages." 104 F.R.D. at 438. Although recognizing the possibility that at some point there might be "an incidental need for equitable relief," the court concluded that such a potential could not sustain certification under 23(b)(2).

The court directed the certification of a 23(b)(3) class, finding the numerosity requirement satisfied by estimates that friable asbestos is present in approximately 14,000 of the nation's schools, about 8,500 of which have an abatement problem. Commonality existed in an underlying core of issues identified as:

> "(a) The general health hazards of asbestos;
>
> (b) defendants' knowledge or reason to know of the health hazards of asbestos;
>
> (c) defendants' failure to warn/test; and
>
> (d) defendants' concert of action and/or conspiracy involving formation of and adherence to industry practices."

104 F.R.D. at 429. Those elements could "be established by common proof, which, although it may be complex, does not vary from class-member school to class-member school."

The typicality requirement was satisfied because the plaintiffs' theories of liability were harmonious, and the named plaintiffs stood in a position similar to other members of the class. Some of the parties had

obliquely questioned the adequacy of representation, but the court concluded that the class was represented by counsel "very experienced with class action litigation and thoroughly familiar with property damage and mass disaster litigation."

In considering the specific requirements for a (b)(3) certification, the court noted that the presence of asbestos in school buildings had a similar impact on each member of the class. Additionally, the question of proximate cause was a legal one which could be resolved on a class-wide basis without involving individualized member-by-member proof.

Addressing the requirement of superiority, the court emphasized that in resolving "at least some of the issues" on a class basis potential savings in expense would result, a consideration particularly important in asbestos litigation with its staggering costs. Moreover, because all claims were for property damage, the level of concern for the plaintiffs' right to choose individual forums and counsel was reduced.

The district judge conceded that the manageability aspect was not "wholly without difficulty," but stated "at this point I believe the management problems can be overcome." The court was convinced that although the substantive tort law of many jurisdictions might be applicable, the basic variations could be reduced to a reasonable number and subclasses could be created to accommodate those differences. Furthermore, plaintiffs represented to the trial judge that they would "direct discovery and trial briefs to meet the most stringent test of liability."

Notwithstanding the difficulties, the court determined that the class action was superior to the only existing alternative -- repetitious individual litigation.

I.

This appeal must be decided against the background of the asbestos scene, an unparalleled situation in American tort law. To date, more than 30,000 personal injury claims have been filed against asbestos manufacturers and producers. An estimated 180,000 additional claims of this type will be on court dockets by the year 2010. Added to those monumental figures are the claims for property damage -- the cost of removing or treating asbestos-based materials used in building construction. Some indication of the magnitude of that potential liability may be gleaned from the fact that the property damage claims filed in the Johns-Manville bankruptcy proceedings stood at $69 billion as of June 1985.

The procedures of the traditional tort system proved effective in unearthing the hazards of asbestos to workers and the failure of its producers to reduce the risk. However, the undeniable limitations of the "one-on-one" approach in coping with the massive onset of claims now in the courts have caused serious and justified concern.

A report compiled by the Rand Corporation, entitled *Asbestos in the Court* (1985), paints a gloomy picture. It points out the high cost and inefficiencies in handling these individual claims as well as the uneven, inconsistent, and unjust results often achieved. Perhaps the least flattering statistic is the high cost of processing these claims: "On the average, the total cost to plaintiffs and defendants of litigating a claim was considerably greater than the amount paid in compensation." Report at page 1.

Inefficiency results primarily from relitigation of the same basic issues in case after case. Since a different jury is empaneled in each action, it must hear

the same evidence that was presented in previous trials. A clearer example of reinventing the wheel thousands of times is hard to imagine.

Apparent inconsistency of jury verdicts has often been a reflection of the ability of the system to sort out individual differences and tailor redress to precise circumstances. In the asbestos litigation field, however, the variation in jury awards has led to complaints that injustice rather than careful apportionment has resulted.

A Philadelphia Common Pleas Judge is quoted in the Rand Report:

> "Results of jury verdicts are capricious and uncertain. Sick people and people who died a terrible death from asbestos are being turned away from the courts, while people with minimal injuries who may never suffer severe asbestos disease are being awarded hundreds of thousands of dollars, and even in excess of a million dollars. The asbestos litigation often resembles the casinos 60 miles east of Philadelphia, more than a courtroom procedure."[3]

The problems are complicated by the variations and permutations of state law that govern tort liability. Most jurisdictions have continued, perhaps understandably, to treat the problem in a parochial and nearsighted manner. It may be that a state court does not wish to deny its litigants the benefits that are available

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3. As an illustration, the same judge wrote about two cases in which each plaintiff had similar illnesses and symptoms: "In the case involving the man who most counsel thought to be the sicker of the two, the jury awarded $15,000. For the other plaintiff, the jury awarded $1,200,000. These results made this litigation more like roulette than jurisprudence." Rand Report at 42.

in other jurisdictions. An attempt by a single state to impose some equitable form of apportionment to claims presently pending and to those inevitably arising in the future is discouraged because other jurisdictions are not required to adopt a similarly enlightened viewpoint. A forum wishing to take the long-range view might find that its efforts were not only ineffective but unfair to its citizenry because claimants in the other states could drain off all the assets available for satisfaction of claims.

The national dimensions of the problem have led to calls for congressional action. Although the subject has attracted the attention of individual representatives and senators, no legislative response has garnered enough support to be enacted. Frustrated by the seemingly intractable problems inherent in the present situation, a thoughtful minority of the Court of Appeals of the Fifth Circuit would have certified to the United States Supreme Court the question of whether federal common law can apply to asbestos litigation. *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) (in banc), *on rehearing*, 781 F.2d 394 (5th Cir. 1986) (The original in banc majority certified certain questions to the state supreme court, which declined to rule on them).

Although necessarily brief, this sketch of the background of asbestos litigation is enough to show that this is not a routine class action.

II.

Our first issue is appellate jurisdiction over the various questions presented. We have articulated a policy against freely accepting appeals from class certification orders where the action is grounded in the discretionary power of the district court. *Link v.*

Mercedes-Benz, Inc., 550 F.2d 860, 862 (3d Cir. 1977). To qualify for interlocutory review, a class certification decision must implicate special factors that take it outside the general rule. *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1087 (3d Cir. 1976); *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

We have no doubt that the question submitted under § 1292(b), focusing on the applicability of the Anti-Injunction Act to the mandatory class action under Rule 23(b)(1)(B), presents such an exception. Review of that issue also necessarily calls into consideration the propriety of class certification *vel non*.[4]

The power under § 1292(b) to review the district court's decisions on the Rule 23(b)(2) and (b)(3) matters is not as clearly defined. In *Murphy v. Heppenstall Co.*, 635 F.2d 233, 235 n.1 (3d Cir. 1980), we said, "On a Section 1292(b) appeal we consider all grounds which might require a reversal of the order appealed from." *See also Johnson v. Alldredge*, 448 F.2d 820 (3d Cir. 1973), *cert. denied sub nom. Conrath v. Johnson*, 419 U.S. 882 (1974).

Here the district judge incorporated all of his rulings on the three class action certification requests into one order. Even if that were not enough to give us appellate jurisdiction over the Rule 23(b)(2) and (b)(3) issues, we conclude that because so many of the factors relevant to the (b)(1)(B) class are also crucial to the (b)(2) and (b)(3) certifications, resolving some of the

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4. Having found jurisdiction under § 1292(b), we need not discuss whether § 1292(a)(1) applies because of the injunctive orders issued in the related, consolidated cases. In any event, review under § 1292(a)(1) is more restrictive. Kershner v. Mazurkiewicz, 670 F.2d 440 (3d Cir. 1982); Tustin v. Heckler, 749 F.2d 1055, 1065 (3d Cir. 1984).

questions now while reserving the others until after final judgment would be neither practicable nor desirable.[5]

Accordingly, we conclude that we have jurisdiction to consider all facets of the class certification order.

III.

THE 23(b)(1)(B) CERTIFICATION

All class actions must meet the prerequisites of Rule 23(a): numerosity, existence of questions of law or fact common to the class, typicality of claims or defenses, and adequacy of representation. Assuming the existence of these factors for present purposes, we proceed to the special elements of the (b)(1)(B) class, mindful that the most significant aspect of such a class is its mandatory character. All those who come within the description in the certification become, and must remain, members of the class because no opt-out provision exists.

In a diversity action such as this, certification of a mandatory class raises serious questions of personal jurisdiction and intrusion into the autonomous operation of state judicial systems. Another complicating factor is the Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits a federal court from enjoining proceedings in a state court except with express Congressional authorization "or where necessary in aid of its jurisdiction or to protect or

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5. Counsel opposing interlocutory review admit that this court has the power to review the order *in toto* under our precedents. Nonetheless, they urge that we exercise discretion and confine our consideration to the precise legal question certified under § 1292(b). Although review in these peculiar circumstances should be broad, we intend in no way to diminish the stature of Link v. Mercedes-Benz, Inc., 550 F.2d 860 (3d Cir. 1977), as precedent in this court.

effectuate its judgment." By contrast, inclusion of the opt-out provision in 23(b)(3) class actions removes many of the problems raised by a mandatory procedure. Use of a voluntary class assures that only willing plaintiffs are before the court.

Rule 23(b)(1)(B) applies where there is a risk that "adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

Because plaintiffs had presented no evidence that the defendants' available assets would be insufficient to pay all claims, the district court did not rely on a "limited fund" theory as a basis for class certification. The proponents of the mandatory class, however, asserted "the very real possibility" that late-coming plaintiffs would be unable to receive punitive damages if a court decided in the future that defendants had been punished enough. In short, at some point punitive damages might be prohibited because they would amount to overkill, a proposition advanced in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967). Finding a "substantial possibility" of the overkill scenario, the district court determined that creation of a (b)(1)(B) class was warranted as a measure to promote "equality of treatment for all litigants."

The demands for punitive damages have propelled this action into the controversy over awarding exemplary damages in successive mass tort cases arising from the same wrongful act. Problems in this area have been created by the failure of some courts to recognize the reasons underlying punitive damages.

Exemplary damages are said to date back to the Code of Hammurabi of 2000 B.C. *See* Owen, *Problems*

in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 10 (1982).[6] In a 1763 case, *Huckle v. Money*, 2 Will. K.B. 206, 95 Eng. Rep. 768, the court approved a punitive damage verdict where the the small size of the actual loss resulting from an illegal entry justified the jury verdict in excess of that amount. *See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d at 836. Since then punitive awards have generally been available when the defendant's conduct was either intentional or so reckless as to be considered outrageous.

. In this country, most jurisdictions have adopted the doctrine in one form or another. The Restatement (Second) of Torts § 908 and the majority of states endorse exemplary damages for punishment and deterrence. As such, these awards act almost as a form of criminal penalty administered in a civil court at the request of a plaintiff who serves somewhat as a private attorney general.

Consistent with this scheme, punitive damages form no part of the compensatory award--in theory the plaintiff's losses are fully redressed before consideration is given to exemplary damages.[7] Because

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6. Professor Owen published an article in 1976 generally approving punitive damages in the product liability context. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257 (1976). Concerned by sky-rocketing awards in cases that followed, some six years later he wrote on the necessity of curbing abuses and restricting the grounds of eligibility for such awards. *See* 49 U. Chi. L. Rev. 1 (1982). Since the publication of the second article, verdicts have increased dramatically both in size and frequency.

7. In four states, New Hampshire, Georgia, Michigan, and Connecticut, punitive damages have been allowed only to enhance the compensatory damages or to recover additional expenses, such as the cost of litigation. Ghiardi & Kircher, *Punitive Damages Law and Practice*, § 4.02 *et seq.* (1984).

the intent is to inflict punishment on a culpable defendant, in many jurisdictions insurance against such awards is contrary to public policy. *Compare Northwestern Nat'l. Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962), *with Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1 (Tenn. 1964). *See* Ghiardi & Kircher, *Punitive Damages Law & Practice*, § 6.11 (1984). *Cf.* Shaumaier & McKinsey, *The Insurability of Punitive Damages*, 72 A.B.A.J. 68 (1986).

In the era when most tort suits were "one-against-one" contests, a single act triggered a single punishment. The increasingly prevalent mass tort situation, however, exposes a defendant to repetitious punishment for the same culpable conduct. The parallels between the assessment of exemplary damages and a fine levied in criminal courts have led to suggestions that the concepts of double jeopardy and excessive punishment should be invoked in the civil field as well. *See Aetna Life Ins. Co. v. Lavoie*, 46 C.C.H. S.Ct. Bull. P. B1945 (Apr. 22, 1986); *see also* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173 (1931); *cf.* Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. Chi. L. Rev. 408 (1967).

Similar concerns have prompted highly respected judges to comment on the possibility that the due process clause might contain some constitutional limitation on the amount of exemplary damages to be awarded. "Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process." *In re Federal Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982)

(Heaney, J. dissenting). "There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction." *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 728 (1983).

In addition to a possible federal constitutional limitation, state substantive tort law could place restraints on repetitive punitive damage awards. This concept, aimed at the prevention of "overkill" as discussed in *Roginsky*, has been labeled the "limited generosity" theory by some of the parties to this case.

In *Roginsky*, Judge Friendly speculated on the possibility of having one court assess a single punitive damage award for distribution to all successful plaintiffs. 378 F.2d at 839 n.11. *See also* Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983). The district court's (b)(1)(B) certification in this case is a variation on that same theme.

In a thoughtful dissertation prepared in the course of the LL.M. program for judges conducted at the University of Virginia Law School, Judge R. Barclay Surrick thoroughly reviewed the doctrine of punitive damages. He concluded that in the field of asbestos litigation, "[b]alancing the benefits to be derived from continued imposition of punitive damages against the social and economic consequences of such a course of action, it appears that the continued imposition of punitive damages cannot be justified." Surrick, *Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?*, 87 Dick. L. Rev. 265, 296 (1983).

Cognizant of these concerns, two federal courts of appeals have nevertheless allowed awards of punitive

damages in asbestos cases on the ground that they were permitted by state law. *Jackson v. Johns-Manville*, 781 F.2d 394 (5th Cir. 1986); *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985). In the latter case, the court rejected the defendant's due process contention, stating that "As a matter of federal constitutional law we believe that the presence of a judicial tribunal before which to litigate the propriety of a punitive damages award provides Johns-Manville with all the procedural safeguards to which it is due." 776 F.2d at 1571.

Cathey treated the defendant's argument on punitive damages as raising only a procedural due process issue. But the concerns recited by a number of courts and commentators are centered on the substantive component of due process. *Cf. Daniels v. Williams*, 54 U.S.L.W. 4090, 4093 (Jan. 21, 1986) (Stevens, J., concurring) (Substantive due process "prohibits a State from taking certain action[s] 'regardless of the fairness of the procedures used to implement them.'").

Thus powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts. Preliminarily we will assume, without deciding, that these arguments might provide a threshold justification for the exercise of discretion in certifying a nationwide (mandatory) Rule 23(b)(1)(B) class for punitive damages. We nonetheless hold that the district court abused its discretion in certifying the 23(b)(1)(B) class here because neither the record nor the court's findings are adequate to support the procedure.

The district court made no factual findings at all as to the potential amount and scope of punitive

damages. This is in sharp contrast to the detailed findings on the subject in *In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 104 S.Ct. 1417 (1984). The most the district court mustered here was its conclusion that:

> It is apparent that there is a substantial possibility that early awards of punitive damages in individual cases will impair or impede the ability of future claimants to obtain punitive damages. The reality of such impairment has been recognized by commentators and courts. (citations omitted).

104 F.R.D. at 437.

We are aware of the inherent limitations on any factual inquiry undertaken at such an early stage of the litigation, and we recognize that any record that could be developed would be inevitably predictive. Nonetheless, in our view these findings fall short of the mark.

Moreover, some basic considerations expose a critical flaw in the district court's analysis. The class certified does not even include all property damage claimants. Claims for repair of municipal buildings, for instance, are omitted, as are those of homeowners. Within a few weeks after oral argument in this appeal, a jury awarded $6 million in a property damage case brought as a result of the presence of asbestos products in a city hall. Added to the recovery was $2 million in punitive damages. *City of Greenville v. W.R. Grace & Co.*, No. 6:85-1693-3 (D.S.C.).

There is some evidence that the school claims make up a significant portion of the total property damage alleged. *See Asbestos Litigation Reporter* at 10,243-44 (June 21, 1985). Clearly, however, this aspect of the litigation transcends the nation's

classrooms and extends to municipal buildings, homes, and other structures.

Far more significant are the tens of thousands of personal injury suits in which punitive damage verdicts have been and continue to be assessed. These claims are satisfied from the same pool of assets to which the school districts now look. If a limit is ever placed on the total punitive damages to be imposed on the asbestos defendants, then that limit probably would apply to all claims whether they arise in property damage or personal injury suits. The school claims would be but a small portion of this total.

The circumstances in this case are again a decided contrast to those in the "*Agent Orange*" litigation where all of the claims against the defendants were concentrated in one case. In that circumstance, the court had control over all those affected and could hope to carry out the basic premise justifying the class action -- parity for all victims and reduction of litigation expenses for all parties.

Assuming that the record supported the "limited generosity" theory, we would nonetheless decertify the class on the ground that it is under-inclusive. The "limited generosity" theory is a variation of the "limited fund" situation mentioned in the advisory committee note to Rule 23, the situation in which "claims are made by numerous persons against a fund insufficient to satisfy all claims." Fed. R. Civ. P. 23 advisory committee note. More precisely, "limited generosity" (or "punitive damages overkill," as some class members call it) is the functional equivalent of the limited fund in that, by operation of the limited generosity principle, only a limited amount of punitive damage funds will be available, regardless of the ability of the defendants to pay. Since the purpose of a 23(b)(1)(B) class is to avoid a judgment that "while not technically

concluding the other members, might do so as a practical matter," *id.*, all persons with claims upon the "limited fund" should be included in the 23(b)(1)(B) class.

Thus, because all awards must come from the same defendants, a mandatory class predicated on a potential legal limit to punitive damages would logically include all litigants who seek such awards. From that standpoint, the (b)(1)(B) class certified here is under-inclusive with the result that separate actions by those who should properly be included in the class will go forward. However, the suppression of such separate actions is described in the advisory committee note as "the [reason] for and the principal key to the propriety and value" of a 23(b)(1) class.

The committee notes further illuminate the problem of under-inclusiveness in this context by reference to Rule 19: "The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a)." Rule 19 describes the procedure for "Joinder of Persons Needed for a Just Adjudication." Section (b) of that Rule provides that a suit should be dismissed when joinder of a party is impossible, and the court determines that "in equity and good conscience the action" should not continue.

The considerations mentioned in Rule 19 counsel against maintenance of this mandatory class action in the absence of the other punitive damage claimants.[8]

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8. The situation here is somewhat analogous to the problem presented by an interpleader action in which all claimants to the fund have not been made parties. *See* Metropolitan Life Ins. Co. v. Dumpson, 194 F. Supp. 9 (S.D.N.Y. 1961); *see also* Rapoport v. Banco Mexico Somex, 668 F.2d 667 (2d Cir. 1982).

The primary factor lies in the prejudice "to those already parties" to this action.

The effect of the mandatory class has been to single out the school districts for special and possibly disadvantageous treatment. They have been forced to litigate in a jurisdiction and under a class procedure that many districts do not desire, and their punitive damage claims have been put "on hold" while the protracted class certification procedure runs its course.[9] Because of this delay, this class could end up in a detrimental position if punitive damage awards are precluded because of a future judicial ruling.

Since the thousands of other claimants who seek exemplary damages from the asbestos defendants need not operate within the confines of a mandatory class procedure, the quest for punitive damages remains for them a race to the courthouse door. Consequently, if the district court proves correct in its theory that at some point a limit on all punitive damage awards will be established, the school districts may be prejudiced in their opportunity to share in the available funds in the meantime.

As noted by the district court, Rule 23(b)(1)(B) exists to protect potential claimants and provide equality of treatment. Certification of a punitive damage class under that provision here will not accomplish these objectives. In the court's pursuit of an end that is not attainable, the class designed to be protected will be burdened with hardships not imposed on any other litigants.

Nor do we see how, in the present posture of this litigation, the class could be expanded to confront

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9. It was conceded by counsel at oral argument that resolution of the class members' punitive damage claims would be delayed pending resolution of the compensatory damage (class) claims, a likely delay of several years.

effectively the punitive damage issue in the entire asbestos area. Whether a national class based on a federal constitutional challenge could accomplish that result is obviously not before us. Although we recognize and commend the district judge's attempt to grapple with the seemingly insoluble problems of punitive damages in these cases, we simply cannot find that the avenue he selected will lead to an appropriate and fair resolution.

We do not hold that under-inclusiveness is necessarily fatal to a class created under 23(b)(1)(B);[10] rather, each case requires a careful assessment of the factors mentioned in Rule 19. Courts should give particular attention to the possibility of prejudice either to those omitted from the class or to those within it. In the circumstances here, we conclude that under-inclusiveness does pose an obstacle.

A certain inherent prejudice exists when a litigant is forced to participate in an undesired mandatory class action. That result may be acceptable where the class device will serve the worthwhile goal of protecting the interests of all litigants to a potentially limited fund, but is hard to justify where only a small number of potential claimants can be included in the mandatory action.

A class action may promote efficiency by reducing repetitive testimony and evidence that otherwise would be required in individual trials. Those advantages, however, are secured at the price of delaying the disposition of individual cases that might be tried to conclusion in a number of state and district courts in the interim. In effect, a mandatory class action creates

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10. We obviously do not reach the question whether the notion of under-inclusiveness applies outside of a 23(b)(1)(B) mandatory class action.

a bottleneck by concentrating the litigation, at least for a period, before one judge instead of spreading the individual cases out among many trial forums.

The "limited generosity" theory poses yet another concern. Because that concept is based on state law, the lack of uniformity creates difficulties in this diversity case. Federal courts are bound by the constraints of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1948), and the dictates of state law may not be buried under the vast expanse of a federal class action. The parties' rights under state substantive law must be respected, and if that is not possible in a class action, then that procedure may not be used.

It follows that if we cannot make a reasonable prediction that state courts will uniformly accept the limited generosity theory, a class may not be certified with that concept as its underlying justification.

No state has yet held that the goals of punishment and deterrence have been met in asbestos cases, nor has the availability of further punitive damages been significantly restricted. As noted earlier, parochial considerations would tend to discourage individual states from eliminating punitive damages in the absence of similar rulings by the others. Nor even if such a movement gets under way is it likely that most states would implement the concept within a reasonably contemporaneous period.

Nothing in the record supports the expectation that a substantial number of states will adopt the limited generosity theory in the foreseeable life of this class action. We are aware of the growing sentiment to have state legislatures revise existing tort law. But despite strong arguments favoring limitations on punitive damages and the increasing number of bankruptcies, the "business as usual" attitude still prevails. *See, e.g., Jackson v. Johns-Manville; Cathey*

v. Johns-Manville; *Moran v. Johns-Manville Corp.*, 691 F.2d 811 (6th Cir. 1982); *Martin v. Johns-Manville Corp.*, 469 A.2d 655, (Pa. Super. 1983); *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242 (Fla. App. 1984), *petition for review denied*, 467 So.2d 999 (Fla. 1985). A mandatory class should not be certified on the basis of a prospect so questionable at this time. The record before us is simply inadequate to support a (b)(1)(B) certification on a limited generosity theory.

Opponents of the mandatory class have also argued that its use here would be inconsistent with the due process considerations discussed in *Phillips Petroleum Co. v. Shutts*, 53 U.S.L.W. 4879 (June 25, 1985), and would violate 28 U.S.C. § 2283. *See In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982). Our resolution makes consideration of those issues unnecessary. Following the lead of the courts in *In Re Bendectin Products Liability Litigation*, 749 F.2d 300, 306 (6th Cir. 1984), and *Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 852 (9th Cir. 1982), we hold open the possibility of a 23(b)(1)(B) punitive damage class in more appropriate circumstances.

IV.

DENIAL OF 23(b)(2) CERTIFICATION

A class may be certified under 23(b)(2) when the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Plaintiffs here seek mandatory injunctive relief in the form of certain remedial action and restitution for expenditures already incurred to ameliorate asbestos hazards.

The district court concluded that despite the plaintiffs' ingenuity the claims in this suit were essentially for damages. The judge pointed to the advisory committee notes accompanying Rule 23(b)(2), which state that it "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." The district court did not rule out the possible application of equitable remedies at some stage of the proceeding but concluded that a (b)(2) certification was not appropriate at this time.

Precedent supports the district court's view that an action for money damages may not be maintained as a Rule 23(b)(2) class action. *See, e.g., Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594 (4th Cir. 1976); *In re Arthur Treacher's Franchise Litigation*, 93 F.R.D. 590, 594 (E.D. Pa. 1982). We see no justification for overturning the district judge's evaluation of the realities of the litigation before him. Counsel's desire to have a mandatory class is understandable, but the case for such a certification has not been established.

We find neither error of law nor abuse of discretion in the judge's ruling, and consequently will affirm the denial of a (b)(2) class.

V.

THE 23(b)(3) CERTIFICATION

The advisory committee notes to (b)(3) state that a "mass accident" causing injuries to numerous persons is generally not appropriate for class action treatment because "significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." If such an action were conducted as a class action, it "would degenerate in practice into multiple lawsuits separately tried."

Although that statement continues to be repeated in case law, there is growing acceptance of the notion that some mass accident situations may be good candidates for class action treatment. An airplane crash, for instance, would present the same liability questions for each passenger, although the damages would depend on individual circumstances. Determination of the liability issues in one suit may represent a substantial savings in time and resources. Even if the action thereafter "degenerates" into a series of individual damage suits, the result nevertheless works an improvement over the situation in which the same separate suits require adjudication on liability using the same evidence over and over again. *See Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla. 1973).

Reassessment of the utility of the class action in the mass tort area has come about, no doubt, because courts have realized that such an action need not resolve all issues in the litigation. *See* Fed.R.Civ.P. 23(c)(4)(A). If economies can be achieved by use of the class device, then its application must be given serious and sympathetic consideration.

Concentration of individual damage suits in one forum can lead to formidable problems, but the realities of litigation should not be overlooked in theoretical musings. Most tort cases settle, and the preliminary maneuverings in litigation today are designed as much, if not more, for settlement purposes than for trial. Settlements of class actions often result in savings for all concerned.

Part of the reluctance to apply the class action to mass torts is rooted in the notion that individual plaintiffs have the right to select their own counsel and forum, particularly in personal injury actions. *See Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982); *Yandle v. PPG Indus., Inc.*,

65 F.R.D. 566 (E.D. Tex. 1974). That factor has little, if any, relevance in this case because the claims are limited to property damage, and school districts are unlikely to have strong emotional ties to the litigation. *See In re Three Mile Island Litigation*, 87 F.R.D. 433 (M.D. Pa. 1980) (certifying class action as to economic claims but not for personal injuries). Furthermore, the school districts have the right to opt out, and some have stated their intention to do so.

In short, the trend has been for courts to be more receptive to use of the class action in mass tort litigation. *See Wright & Colussi, The Successful Use of the Class Action Device in the Management of the Skywalk Tort Litigation*, 52 U.M.K.C. L. Rev. 141 (1984); Williams, *Mass Tort Class Actions: Going, Going, Gone?* 98 F.R.D. 323; Wright & Miller, *Federal Practice and Procedure*, § 1783: Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 Harv. L. Rev. 114 (1983).

In reviewing the district court's (b)(3) certification, we must decide whether the criteria of Rule 23(a) are met. The requirements of numerosity, typicality, and adequacy of representation were found to be satisfied in this case, and we affirm those determinations on the basis of the district court's analysis. The only serious challenge raised to the 23(a) ruling is the argument that no "questions of law or fact common to the class" exist. *See* Rule 23(a)(2). Addressing that contention, we examine the district court's identification of the common issues involved in the plaintiffs' claims. *Bogosian v. Gulf Oil Co.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). If the district court applied the correct legal standard, its class action determination is subject to review for abuse of discretion. 561 F.2d at 448; *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756-57 (3d Cir. 1974) (in banc).

Noting that the complaints allege claims for damages based on negligence, strict liability, breach of warranty, intentional tort, concert of action and civil conspiracy, the district court explained that all these claims "arise out of the same common nucleus of operative facts relating to defendants' conduct and the nature of asbestos products." 104 F.R.D. at 432.

The district judge identified common factual issues as the health hazards of asbestos, the defendants' knowledge of those dangers, the failure to warn or test, and the defendants' concert of action or conspiracy in the formation of and adherence to industry practices. The court also believed that the proof of these matters would not vary widely from one class member to another. While harboring some reservations as to the breadth of the district court's analysis, we agree with its determination that Rule 23(a)(2) is satisfied.

Plaintiffs aver that low-level exposure to asbestos constitutes an excessive risk of harm, and that the presence of ambient fibers requires expensive remedial action to comply with federal legislation and regulations. Plaintiffs contend that the presence of any airborne asbestos fibers in a school presents an unacceptable hazard. Whether that is true or whether only a higher concentration creates a danger is an issue common to all members of the plaintiff class. Ascertaining the danger point is critical to the determination of whether class members have sustained a legal injury and also is pertinent in establishing the existence of a defective product.

The plaintiffs' contention that defendants knew of the dangers of asbestos and failed to warn is also common to the members of the class. The opponents assert that the defendants' knowledge cannot be proved on a common basis because medical

understanding of the effects of asbestos exposure has "changed markedly" over the years. The focus, however, must be on whether the fact to be proved is common to the members of the class, not whether it is common to all the defendants. *See Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975).

Similarly, proof of concert of action or conspiracy by the defendants (or some of them) involves common questions.

We find ourselves in substantial agreement with the reasoning of the Court of Appeals for the Fifth Circuit which, in upholding a (b)(3) class action of 893 asbestos personal injury claims, noted that the "threshold of commonality is not high." *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468 (5th Cir. 1986).

Once the mandates of Rule 23(a) are satisfied, certification may be upheld when common issues predominate over individual ones and the class method of adjudication is superior to existing alternatives. There may be cases in which class resolution of one issue or a small group of them will so advance the litigation that they may fairly be said to predominate. Resolution of common issues need not guarantee a conclusive finding on liability, *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985), nor is it a disqualification that damages must be assessed on an individual basis. *See Bogosian*, 561 F.2d at 456.

Experience shows that in the asbestos litigation arena redundant evidence is the rule rather than the exception. In case after case, the health issues, the question of injury causation, and the knowledge of the defendants are explored, often by the same witnesses. Efforts to achieve expeditious disposition of the cases by invocation of *stare decisis* and collateral estoppel have been largely unsuccessful. *See Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir.

1982); *Migues v. Fibreboard Corp.*, 662 F.2d 1182 (5th Cir. 1982).

The use of the class action device appears to offer some hope of reducing the expenditure of time and money needed to resolve the common issues which are of substantial importance. As the *Jenkins* court commented, "It is difficult to imagine that class jury findings on the class questions will not significantly advance the resolution of the underlying hundreds of cases." 782 F.2d at 472-73.

In some ways, *Jenkins* presented more difficult problems because of the complexity of the causation questions in personal injury suits; that phase of a property damage claim is more straightforward. However, the *Jenkins* class action is confined to claims arising under the law of a single state. Here the court is confronted with the substantive law of many states.

To meet the problem of diversity in applicable state law, class plaintiffs have undertaken an extensive analysis of the variances in products liability among the jurisdictions. That review separates the law into four categories. Even assuming additional permutations and combinations, plaintiffs have made a creditable showing, which apparently satisfied the district court, that class certification does not present insuperable obstacles. Although we have some doubt on this score, the effort may nonetheless prove successful.[11]

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11. One commentator has written:

> "there will be a point at which the sheer magnitude of the task of construing the various laws will compel a court not to certify the multistate class or to reduce it to a more manageable number of states. Even short of that point, choice of law may pose major problems. The first is the danger of an unwarranted intrusion into another state's legal affairs through a mistaken application of its laws. The

We have cited only a few illustrations and have not attempted to compile a complete listing of the practical problems in this case. Some of these difficulties have already been alluded to in the order of the multi-district panel refusing to consolidate pretrial activity in some twenty school district cases. *See In re Asbestos School Products Liability Litigation*, 606 F.Supp. 713 (J.P.M.L. 1985).

As we see it, at the present stage, manageability is a serious concern. In a sense, a whole industry is on trial, presenting a likelihood that defendants occupying various positions in the distribution chain could bear differing degrees of responsibility for the alleged injury to the class. For example, two of the common questions are the defendants' knowledge of the dangers of asbestos and the existence of an industry-wide conspiracy to suppress that knowledge. Although the plaintiffs' proof on those points would not differ from class member to class member, certain defendants may respond on an individual basis as to their lack of culpability. The potential for individualized defenses does not detract from the commonality of the questions as viewed from the standpoint of the class members, but the problem clearly poses significant case management concerns.

Manageability is a practical problem, one with which a district court generally has a greater degree of expertise and familiarity than does an appellate court. *Link v. Mercedes-Benz, Inc.*, 550 F.2d at 864. Hence, a district court must necessarily enjoy wide discretion,

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court should thus consider its own familiarity with the other state's law, the degree to which that law is unclear or unsettled, and the extent to which it implicates important interests of the other state."

Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718, 742 (1979).

and we are not inclined to reverse a certification before the district judge has had an opportunity to put the matter to a test. We point out the critical fact that certification is conditional. When, and if, the district court is convinced that the litigation cannot be managed, decertification is proper. *See Payton v. Abbott Labs*, 100 F.R.D. 336 (D. Mass. 1983).

As the case goes forward, the district court may well find other important common issues, perhaps even more critical for resolution than those sorted out at this early stage. We are unwilling to foreclose that possibility. Nor do we limit the option of the district court to decertify if the issues it has classified as substantial later appear insufficient to justify the class procedure.

We acknowledge that our reluctance to vacate the (b)(3) certification is influenced by the highly unusual nature of asbestos litigation. The district court has demonstrated a willingness to attempt to cope with an unprecedented situation in a somewhat novel fashion, and we do not wish to foreclose an approach that might offer some possibility of improvement over the methods employed to date.

Accordingly, the order certifying a (b)(3) class will be affirmed as will the order denying a (b)(2) certification. The order granting a (b)(1)(B) class will be vacated.

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1642, 84-1643, 84-1649, 84-1651, 84-1652, 84-1670, 84-1671, 84-1672, 84-1692, 84-1693, 84-1694, 84-1695, 84-1696, 85-1243, 85-1272, 85-1287 & 85-1288

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER
MANHEIM TOWNSHIP SCHOOL DISTRICT
LAMPETER-STRASBURG SCHOOL DISTRICT
and
NORTHEASTERN SCHOOL DISTRICT

v.

LAKE ASBESTOS OF QUEBEC, LTD., THE CELOTEX CORP., RAYMARK INDUSTRIES, INC., UNION CARBIDE CORP., ASBESTOSPRAY CORP., SPRAYO-FLAKE CO., NATIONAL GYPSUM CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES, INC., DANA CORP., U.S. GYPSUM, U.S. MINERAL PRODUCTS CO., SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WORBEN CO., INC., WILKIN INSULATION CO., W.R. GRACE & CO., OWENS-CORNING FIBERGLAS CORP., STANDARD INSULATIONS, INC., NORTH AMERICAN ASBESTOS CORP., CASSIAR RESOURCES LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., TURNER & NEWALL LTD., THE FLINTKOTE CO., FIBREBOARD CORP., GAF CORP., UNIROYAL, INC., CAPE ASBESTOS, PFIZER, INC., KAISER CEMENT CORP., BES-TEX, INC., GEORGIA-PACIFIC CORP.
(D.C. Civil No. 83-0268)

BARNWELL SCHOOL DISTRICT NO. 45

v.

U.S GYPSUM, NATIONAL GYPSUM CO., W.R. GRACE & CO., ASBESTOSPRAY CORP., SPRAYO-FLAKE CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES, INC., DANA CORP., U.S. MINERAL PRODUCTS CO., SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WILKIN INSULATION CO., TURNER & NEWALL LTD., J.W. ROBERTS, LTD., PROKO INDUSTRIES, INC., RAYMARK INDUSTRIES, INC., OWENS-CORNING FIBERGLAS CORP., STANDARD INSULATIONS, INC., SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., THE FLINTKOTE CO., FIBREBOARD CORP., UNIROYAL, INC., ROCK WOOL MANUFACTURING CO., INC., EMPIRE ACE INSULATION MANUFACTURING CORP., EAGLE-PICHER INDUSTRIES, INC., FORTY-EIGHT INSULATIONS, INC., COMBUSTION ENGINEERING, INC., GAF CORP., LAC D'AMIANTE DU QUEBEC, LTEE., THE CELOTEX CORP., CAREY-CANADA, INC., UNION CARBIDE CORP., BRINCO MINING, LTD., formerly known as CASSIAR RESOURCES, LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, CAPE ASBESTOS, NORTH AMERICAN ASBESTOS CORP., TURNER ASBESTOS FIBRES, LTD., C. TENNANT & SONS, HUXLEY DEVELOPMENT CORP., ASTEN GROUP, INC., H.K. PORTER CO., NICOLET INDUSTRIES, ARMSTRONG CONTRACTING & SUPPLY CORP., BENJAMIN FOSTER CO., PITTSBURGH CORNING CORP., ARMSTRONG WORLD INDUSTRIES, INC., WORBEN CO., INC.
(D.C. Civil No. 83-1395)

GAF CORP., APPELLANT IN 84-1642, 85-1272 & 85-1288

LOS ANGELES UNIFIED SCHOOL DISTRICT, APPELLANT IN 84-1643

FIBREBOARD CORP., APPELLANT IN 84-1649

THE CELOTEX CORP., AND CAREY-CANADA, INC., APPELLANTS IN 84-1651 & 85-1243

NATIONAL GYPSUM CO., U. S. GYPSUM CO., AND W.R. GRACE & CO., APPELLANTS IN 84-1652 & 85-1287

BOARD OF EDUCATION OF CLIFTON, APPELLANT IN 84-1670

LAC D'AMIANTE DU QUEBEC, LTEE., APPELLANT IN 84-1671

OWENS-CORNING FIBERGLAS CORP., APPELLANT IN 84-1672

BARNWELL SCHOOL DISTRICT NO. 45, APPELLANT IN 84-1692

BELL ASBESTOS MINES, LTD. AND U. S. MINERAL PRODUCTS CO., APPELLANTS IN 84-1693

ASBESTOS CORPORATION LIMITED, APPELLANT IN 84-1694

BOARDS OF EDUCATION OF ANDERSON COUNTY, JOHNSON COUNTY, LOUDON COUNTY, KNOX COUNTY, CITY OF KNOXVILLE, AND HAWKINS COUNTY, TENNESSEE, APPELLANTS IN 84-1695

H.K. PORTER CO., SOUTHERN TEXTILE CORP., AND FORTY-EIGHT INSULATIONS, INC. APPELLANTS IN 84-1696

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: WEIS, HIGGINBOTHAM and BECKER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 6, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 28, 1984, as amended by the order entered March 29, 1985, be, and the same is hereby affirmed insofar as it certified a (b)(3) class and denied a (b)(2) certification, and vacated insofar as it granted a (b)(1)(B) class. All of the above in accordance with the opinion of this Court.

ATTEST

/s/ Sally Mrvos
Clerk

May 1, 1986

Certified as a true copy and issued in
lieu of a formal mandate on June 10, 1986.

Test: /s/ Sally Mrvos

Clerk, U.S. Court of Appeals for the Third Circuit

Judgment of the United States Court of Appeals for the Third Circuit in Appeal No. 85-1126

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-1126

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
and
NORTHEASTERN SCHOOL DISTRICT

v.

LAKE ASBESTOS OF QUEBEC, LTD., THE CELOTEX CORPORATION, RAYMARK INDUSTRIES, INC., UNION CARBIDE CORP., ASBESTOSPRAY CORP., SPRAYO-FLAKE COMPANY, NATIONAL GYPSUM CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES, INC., DANA CORP., U.S. GYPSUM, U.S. MINERAL PRODUCTS CO., SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WORBEN CO., INC., WILKIN INSULATION CO., W. R. GRACE & CO., OWENS-CORNING FIBERGLAS CORPORATION, STANDARD INSULATIONS, INC., NORTH AMERICAN ASBESTOS CORP., CASSIAR RESOURCES LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., TURNER & NEWALL LIMITED, THE FLINTKOTE CO., FIBREBOARD CORPORATION, GAF CORP., UNIROYAL, INC., CAPE ASBESTOS, PFIZER, INC., KAISER CEMENT CORPORATION, BES-TEX, INC., GEORGIA-PACIFIC CORP.

County of Anderson, Tennessee, acting by and through its Board of Education and Superintendent of Schools, Appellant

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 83-0268)

Present: WEIS, HIGGINBOTHAM and BECKER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 6, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 1, 1985, be, and the same is hereby vacated.

ATTEST

/s/ Sally Mrvos
Clerk

May 1, 1986

Certified as a true copy and issued in
lieu of a formal mandate on June 10, 1986.

Test: /s/ Sally Mrvos

Clerk, U.S. Court of Appeals for the Third Circuit

Judgment of the United States Court of Appeals for the Third Circuit in Appeal No. 85-1480

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-1480

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
and
NORTHEASTERN SCHOOL DISTRICT

v.

LAKE ASBESTOS OF QUEBEC, LTD., THE CELOTEX CORPORATION, RAYMARK INDUSTRIES, INC., UNION CARBIDE CORP., ASBESTOSPRAY CORP., SPRAYO-FLAKE COMPANY, NATIONAL GYPSUM CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES, INC., DANA CORP., U.S. GYPSUM, U.S. MINERAL PRODUCTS CO., SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WORBEN CO., INC., WILKIN INSULATION CO., W. R. GRACE & CO., OWENS-CORNING FIBERGLAS CORPORATION, STANDARD INSULATIONS, INC., NORTH AMERICAN ASBESTOS CORP., CASSIAR RESOURCES LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., TURNER & NEWALL LIMITED, THE FLINTKOTE CO., FIBREBOARD CORPORATION, GAF CORP., UNIROYAL, INC., CAPE ASBESTOS, PFIZER, INC., KAISER CEMENT CORPORATION, BES-TEX, INC., GEORGIA-PACIFIC CORP.

Spartanburg County, South Carolina School District Seven, absent class member, and Barnwell School District No. 45, class representative, Appellants

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 83-0268)

Present: WEIS, HIGGINBOTHAM and BECKER, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 6, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 2, 1985, be, and the same is hereby vacated.

ATTEST

/s/ Sally Mrvos
Clerk

May 1, 1986

Certified as a true copy and issued in
lieu of a formal mandate on June 10, 1986.

Test: /s/ Sally Mrvos

Clerk, U.S. Court of Appeals for the Third Circuit

Judgment of the United States Court of Appeals for the Third Circuit in Appeal No. 85-1599

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-1599

IN RE: SCHOOL ASBESTOS LITIGATION
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
and
NORTHEASTERN SCHOOL DISTRICT

v.

LAKE ASBESTOS OF QUEBEC, LTD., THE CELOTEX CORPORATION, RAYMARK INDUSTRIES, INC., UNION CARBIDE CORP., ASBESTOSPRAY CORP., SPRAYO-FLAKE COMPANY, NATIONAL GYPSUM CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES, INC., DANA CORP., U.S. GYPSUM, U.S. MINERAL PRODUCTS CO., SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WORBEN CO., INC., WILKIN INSULATION CO., W.R. GRACE & CO., OWENS-CORNING FIBERGLAS CORPORATION, STANDARD INSULATIONS, INC., NORTH AMERICAN ASBESTOS CORP., CASSIAR RESOURCES LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., TURNER & NEWALL LIMITED, THE FLINTKOTE CO., FIBREBOARD CORPORATION, GAF CORP., UNIROYAL, INC., CAPE ASBESTOS, PFIZER, INC., KAISER CEMENT CORPORATION, BES-TEX, INC., GEORGIA-PACIFIC CORP.

Johnson County, Tennessee Board of Education, Appellant

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 83-0268)

Present: WEIS, HIGGINBOTHAM and BECKER, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 6, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 20, 1985, be, and the same is hereby vacated.

ATTEST

/s/ Sally Mrvos
Clerk

May 1, 1986

Certified as a true copy and issued in lieu of a formal mandate on June 10, 1986.

Test: /s/ Sally Mrvos

Clerk, U.S. Court of Appeals for the Third Circuit

Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1642, 84-1643, 84-1649, 84-1651, 84-1652, 84-1670, 84-1671, 84-1672, 84-1692, 84-1693, 84-1694, 84-1695, 84-1696, 85-1243, 85-1272, 85-1287 & 85-1288

IN RE: SCHOOL ASBESTOS LITIGATION
SCHOOL DISTRICT OF LANCASTER
MANHEIM TOWNSHIP SCHOOL DISTRICT
LAMPETER-STRASBURG SCHOOL DISTRICT
and
NORTHEASTERN SCHOOL DISTRICT
v.
LAKE ASBESTOS OF QUEBEC, LTD., et al.

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, BECKER, STAPLETON, MANSMANN, *Circuit Judges*.

The petition for rehearing filed by National Gypsum Company, United States Gypsum Company, and W. R. Grace & Co., cross-appellants in Nos. 84-1652 and 85-1287 and appellees in other-above listed appeals, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Adams and Sloviter did not participate in the consideration of this matter.

BY THE COURT,

/s/ Weis
Circuit Judge

DATED: June 2, 1986

Memorandum of the United States District Court for the Eastern District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION

MASTER FILE NO. 83-0268
THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM AND ORDER

KELLY, *J.* SEPTEMBER 28, 1984

Presently before the Court is plaintiffs' motion for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs seek certification of a class of essentially all public school districts and private schools in the nation to recover the costs incurred in undertaking asbestos abatement remedial action. Class certification is sought under Rule 23(b)(1)(B), (b)(2) and (b)(3).

The initial complaints in these matters were filed on January 17, 1983, and March 23, 1983, respectively. The representative plaintiffs are four public school districts: the School District of Lancaster, the Manheim Township School District, and Lampeter-Strasburg School District, which reside in the Eastern District of Pennsylvania; and the School District of Barnwell, South Carolina, which is found in the District of South Carolina.

The defendants in these companion actions are members of the asbestos industry. Asbestos products have been used in the construction of schools and other public buildings in the form of spray or trowel-applied coating material for building surfaces, including ceilings, as well as for insulation on pipes and boilers. With the exception of Johns-Manville Corporation, against whom legal process is stayed because of the pending bankruptcy proceedings, the defendants represent, for the time period alleged in the complaints, all of the major producers of friable asbestos construction and insulation products of the type found in

public and private schools throughout the nation, along with their principal suppliers of raw asbestos.

The complaints are grounded in state law, and federal jurisdiction is based upon 28 U.S.C. § 1332 (1982), diversity of citizenship jurisdiction.[1] The complaints allege liability on the basis of negligence, strict liability in tort, intentional tort, breach of warranty, concert of action and common law conspiracy. In addition to recovery of compensatory and punitive money damages, the complaints seek equitable relief in the form of restitution and mandatory injunctive relief involving asbestos abatement remedial action.

I. FACTUAL BACKGROUND

This litigation was triggered by action of the United States Environmental Protection Agency ("EPA") and the Congress. In 1980, the EPA investigated the presence of asbestos in the nation's schools and determined that it constituted a serious hazard to the health of school children and school employees. As a result of the EPA's investigation and findings, the agency promulgated proposed regulations, pursuant to the Toxic Substances Control

1. Because this action is solely a diversity case, the Anchorage School District has challenged the standing of the named plaintiffs. It argues that these plaintiffs lack standing to assert claims on behalf of class members in jurisdictions other than their own. While this argument has some superficial appeal, upon closer analysis, it is apparent that standing requirements are satisfied. Standing, which derives from the article III case or controversy requirement, is met when the plaintiff can demonstrate "injury in fact." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). To what extent that injury is legally cognizable under the laws of the various jurisdictions is a separate inquiry. "Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is not a standing issue, but depends rather on meeting the prerequisites of Rule 23. . . ." 1 H. Newberg, *Newberg on Class Actions* § 1072a, at 124 (1977). Plaintiffs have demonstrated injury in fact and their injury is typical of injury sustained by all putative class members. That is all that is required under Fed. R. Civ. P. 23. *Cf. Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732-34 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Plum Tree, Inc. v. Rouse Company, Inc.*, 58 F.R.D. 377, 375 (E.D. Pa. 1972).

Act, 15 U.S.C. § 2605 (1982), requiring every public and private school in the country to test for the presence of asbestos. 40 C.F.R. §§ 763.100-.119 (1983).

At approximately the same time the EPA promulgated the above proposed regulations, Congress considered and enacted the Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. §§ 3601-3611 (1982). Recognizing the financial hardship imposed by the EPA regulations, the legislature made provision for public and private schools to obtain interest-free loans to accomplish the testing mandated by the EPA and to help defray the costs of subsequent remedial action. However, because of political and budgetary considerations, Congress refrained from making any appropriations for carrying out asbestos abatement remedial action. Instead, Congress directed the United States Attorney General to investigate and report to Congress which parties should bear the ultimate financial and legal responsibility for school asbestos abatement remedial action.

In August, 1981, the Attorney General issued his report finding that important federal environmental policies mandated abatement of the school asbestos problem, and that the asbestos industry should be held responsible. Land and Natural Resources Div., U.S. Dep't of Justice, 97th Cong. 1st Sess., *The Attorney General's Asbestos Liability Report to Congress* iv-vii (Comm. Print 1981) ("Attorney General's Report") (Exhibit C, Plaintiffs' Memorandum in Support of Motion for Class Certification). The Attorney General's Report went on to conclude that no additional federal duty-imposing legislation was necessary and that schools could rely on existing state common law to recover from the industry. *Id.* After the issuance of the Attorney General's Report, this litigation ensued.

II. PROCEDURAL BACKGROUND

Subsequent to the filing of the complaints in the four companion cases, plaintiffs moved, on March 30, 1984, for class certification. Shortly after, plaintiffs filed an additional motion for

immediate class certification against certain defendants, including United States Gypsum Co., National Gypsum Company and W. R. Grace & Co. These three defendants agreed not to oppose a nationwide mandatory class certified under Rule 23(b)(1) and/or 23(b)(2).[2] The logic of these defendants' position was that it was far preferable for them to face one "global" action rather than to litigate thousands of individual cases. On April 13, 1984, this Court certified a mandatory class pursuant to Rules 23(b)(1)(B) and 23(b)(2) as against the three aforementioned defendants. The Order also enjoined the filing of any new complaints or the prosecution of any pending state or federal actions against the three non-opposing defendants. A hearing was set for May 11, 1984 at which time the Court permitted any party to appear and apply for relief from the April 13, 1984 Order.

As a result of the April 13 Order, the alignment of various parties to the litigation shifted. Rather than the usual "plaintiff(s) for" and "defendant(s) against" structure, the school asbestos case divided along the following lines:

1. *Plaintiffs Supporting Mandatory Class Action Certification.*

This group has, throughout these proceedings, argued for a nationwide mandatory class of plaintiff school districts.[3]

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2. Certification under Rule 23(b)(1) and (b)(2) is mandatory in that those who meet the description of the class are not permitted to "opt out" of the class action. Certification under Rule 23(b)(3) is voluntary in that any putative class member is free to "opt out" of the class and commence independent litigation. *See Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 252-53 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Fox v. Prudent Resources Trust*, 69 F.R.D. 74, 77 (E.D. Pa. 1975).

3. The spokesperson for this group is plaintiffs' co-lead counsel David Berger, Esquire. Mr. Berger has associated with, among other counsel, Professor Charles Alan Wright of the University of Texas. Professor Wright addressed the Court at a hearing held on July 30, 1984.

2. *Defendants Supporting Mandatory Class Action Certification.*

This group of three defendants, United States Gypsum Co., National Gypsum Company and W.R. Grace & Co., also referred to in papers and at oral argument as the nonopposing or stipulating defendants, likewise seeks to have a mandatory class certified.[4]

3. *Plaintiffs Opposing Mandatory Class Certification and Supporting an Opt-Out Class Pursuant to Rule 23(b)(3).*

This group's principal representative is the Barnwell School District of South Carolina,[5] one of the four named plaintiffs in this case. This group is strongly opposed to the certification of a mandatory class under Rule 23(b)(1) or (b)(2), but does support an opt-out class pursuant to Rule 23(b)(3).

4. *Defendants Opposing Class Certification Under Any Provision of Rule 23.*

This group opposes any class certification whether mandatory or opt-out.[6]

Oral argument was held on a motion to vacate the April 13 Order on May 11, 1984. On July 16, 1984, the Court vacated its

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4. Lawrence T. Hoyle, Jr., Esquire, counsel to National Gypsum Company and defendants' co-liaison counsel, has acted on behalf of these defendants.

5. Barnwell School District is represented by the law firm of Blatt and Fales, Barnwell, SC. Having terminated David Berger as local counsel subsequent to the April 13th Order, Blatt and Fales associated with Herbert L. Newberg, Esquire, as local counsel. Mr. Newberg is the author of the multivolume treatise entitled *Newberg on Class Actions* (1977). Mr. Newberg was subsequently designated co-lead counsel by Order of the Court dated July 17, 1984. Blatt and Fales have also associated with Professor Arthur R. Miller of Harvard University. Professor Miller addressed the Court at the May 11, 1984 and July 30, 1984 hearings.

6. Ralph W. Brenner, Esquire, counsel to the Celotex Corporation and Carey Canada, Inc. and defendants' co-liaison counsel, represented the position of this group of defendants.

April 13th Order to the extent that the injunction restraining the prosecution of any case filed prior to April 13, 1984 was lifted.

On July 30, 1984 the Court heard oral argument on the merits of the class certification issue. At that time, the Court invited counsel to submit proposals on how a class could be structured so as to maximize the economies accruing to a class action while avoiding the pitfalls associated therewith. The Court futher advised counsel that with that last submission, the "paper chase will have ended," Tr. at 9, and no further obstacle would remain to the decision of the case. It is to that decision I now turn.

III. LEGAL DISCUSSION

In order for a suit to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, the named plaintiffs must establish each of the four threshold requirements of Rule 23(a)[7]: numerosity, commonality, typicality, and adequacy of representation. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d at 246. These requirements are mandatory and failure to establish any one of the Rule 23(a) requirements is fatal to a motion for class action certification. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *Alexander v. Gino's, Inc.*, 621 F.2d 71 (3d Cir.) (per curiam), *cert. denied*, 449 U.S. 953 (1980); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d at 246; *Katz v. Carte Blanche Corporation*, 496 F.2d 747, 756 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974); *Paskel v. Heckler*, 99 F.R.D. 80, 83 (E.D. Pa. 1980).

The named plaintiffs must then show that the action qualifies for class action treatment under at least one of the subsec-

7. Rule 23(a) provides in pertinent part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

tions of Rule 23(b).[8] *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d at 248. Plaintiffs argue that the proposed class meets the requirements and therefore may be maintained under subsections (b)(1)(B), (b)(2) and (b)(3) of Rule 23. In connection with this analysis, the burden of proof remains with the named plaintiffs to set forth sufficient factual information to enable the Court to reasonably permit the action to continue as a class under Rule 23. *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974); *Ladele v. Consolidated Rail Corp.*, 95 F.R.D. 198, 200 (E.D. Pa. 1982); *Ciarrochi v. Provident Nat. Bank*, 83 F.R.D. 357, 360 (E.D. Pa. 1979).

Finally, it is well established that "the central issue raised in a motion for certification is whether a class action is appropriate, not the probability of plaintiff's success on the merits of the substantive claims." *Chestnut Fleet Rentals, Inc. v. Hertz Corp.*, 72 F.R.D. 541, 543 (E.D. Pa. 1976) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974)); *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970).

Having carefully considered the arguments presented by counsel in both their oral and written presentations,[9] I have concluded that a class will be conditionally certified pursuant to Rule 23(b)(3). I have further concluded that a class will also be conditionally certified under Rule 23(b)(1)(B) on the limited issue of punitive damages.

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8. For the text of Rule 23(b) *see* note 11 *infra*.

9. In his presentation to the Court on July 30, 1984, counsel for Barnwell School District, Herbert L. Newberg, Esquire, observed that "[b]oth sides have cut down many trees, in filing their class action briefs, motions, their exhibits . . . If the class action is decided on the weight of the briefs filed, it would be a very close question, probably four gold medals to all of the adverse sides." Tr. at 88. While the Court does not wish to suggest that the scales of justice are to be applied literally, I do share Mr. Newberg's assessment of the Olympian efforts contributed by counsel. The Court's role in deciding the difficult and important question before it has been greatly aided by the diligence, thoroughness and scholarship evidenced in the papers submitted and arguments presented. The Court wishes to express its special appreciation to Professor Miller whose views were particularly elucidating on the complex procedural issues raised by this class certification motion.

A. Rule 23(a)

1. *Numerosity*

The first prerequisite of Rule 23(a) is that the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). As to the numerosity requirement, no legitimate objection to certification can be made. There are approximately 36,000 public school districts and private elementary and secondary schools in the United States. U.S. Dep't. of Educ., *Asbestos In the Schools, A Report to the Congress*, 20 (Sept. 15, 1983) (Exhibit J, Plaintiffs' Memorandum in Support of Motion for Class Certification). Of the 36,000 public school districts and private schools, the United States Department of Education estimates that friable asbestos is present in approximately 14,000 schools. *Id*. Plaintiffs estimate that approximately 8,500 public school districts and private schools manifest an asbestos abatement problem. Affidavit of David Berger §5 (Exhibit R, Plaintiffs' Memorandum in Support of Motion for Class Certification).

There is, of course, no geographical or numerical limit expressed by Rule 23(a)(1) itself, *see Mertz v. Harris*, 497 F.Supp. 1134, 1138 (S.D. Tex. 1980); *Simon v. Westinghouse Elec. Corp.*, 73 F.R.D. 480, 483 (E.D. Pa. 1977) (690,000 putative class members); *In re Penn Central Securities Litigation*, 62 F.R.D. 181, 189 (E.D. Pa. 1974), nor is it necessary that the class representatives have precise knowledge of the exact number of members of the class for purposes of determining that joinder is impracticable. *Hedges Enterprises, Inc. v. Continental Group*, 81 F.R.D. 461, 464-65 (E.D. Pa. 1979). It suffices that it be readily apparent — as is unmistakably the case here — that the size of the class makes joinder impracticable. *Piel v. National Semiconductor Corp.*, 86 F.R.D. 357, 365 (E.D. Pa. 1980).

2. *Commonality*

Rule 23(a)(2), requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The requirement of commonality is aimed at determining whether there is

a need for combined treatment and a benefit to be derived therefrom. The section has been liberally construed, and "those courts that have focused on Rule 23(a)(2) have given it a permissive application so that common questions have been found to exist in a wide range of contexts." 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1763, at 604 (1972). The "permissive application may undoubtedly be attributed to the premise . . . that is, in doubtful cases, the Court should favor the certification of the class." *Piel v. National Semiconductor Corp.*, 86 F.R.D. at 367; *Simon v. Westinghouse Elec. Corp.*, 73 F.R.D. at 487. Rule 23(a)(2) does not require that all issues in the litigation be common, only that common questions exist. *Hummel v. Brennan*, 83 F.R.D. 141, 145 (E.D. Pa. 1979); *Kuhn v. Philadelphia Electric Co.*, 80 F.R.D. 681, 684 (E.D. Pa. 1978). Indeed, a single common question is sufficient to satisfy Rule 23(a)(2). *Simon v. Westinghouse Elec. Corp.*, 73 F.R.D. at 484. Furthermore, not every question of law or fact must be common to each individual member of the class, *Hedges Enterprises, Inc. v. Continental Group*, 81 F.R.D. at 465; *Axelrod v. Saks & Co.*, 77 F.R.D. 441, 444 (E.D. Pa. 1978); *Fox v. Prudent Resources Trust*, 69 F.R.D. at 78, nor is there a requirement that answers to common questions guarantee a determination of liability. *Payton v. Abbott Labs*, 83 F.R.D. 382, 387 (D.Mass. 1979), *vacated* 100 F.R.D. 336 (1983).

A common question is one which arises from a "common nucleus of operative facts" regardless of whether "the underlying facts fluctuate over the class period and vary as to individual claimants." *Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685, 690-91 (E.D. Pa. 1977); *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244, 250 (S.D. Tex. 1978). *See also Muth v. Dechert, Price & Rhoads*, 70 F.R.D. 602, 607 (E.D. Pa. 1976) (common course of conduct yields common questions). In mass tort actions, the requirement of common questions has been satisfied by a showing of commonality either as to liability, *Ouellette v. International Paper Co.*, 86 F.R.D. 476, 479 (D.Vt. 1980); *Coburn v. 4-F Corp.*, 77 F.R.D. 43, 44 (E.D. Ky. 1977), or as to the cause or impact of the tortious action, *In re Three Mile*

Island Litigation, 87 F.R.D. 433, 439, (M.D. Pa. 1980) ("*Three Mile Island*").

Plaintiffs allege a number of claims involving both legal and equitable relief. The predicate of each claim is a violation of law, or breach of a legal duty, which, in conjunction with a showing of injury causally linked to defendants' wrongful conduct, creates liability to the members of the class. Although each claim is grounded in the breach of a separate, independent duty owed the individual members of the class, the underlying "common core of questions," *Cohen v. Uniroyal, Inc.*, 77 F.R.D. at 690, which plaintiffs contend make out a *prima facie* case of breach of a legal duty under the theories of liability specified in the complaint, are as follows:

> (a) the general health hazards of asbestos;
>
> (b) defendants' knowledge or reason to know of the health hazards of asbestos;
>
> (c) defendants' failure to warn/test; and
>
> (d) defendants' concert of action and/or conspiracy involving formation of and adherence to industry practices.

All of these elements can be established by common proof, which, although it may be complex, does not vary from class-member school to class-member school. Plaintiffs have demonstrated common questions sufficient to satisfy Rule 23(a)(2).

3. *Typicality*

Rule 23(a)(3) requires that "the claims . . . of the representative parties" be "typical . . . of the claims of the class." Fed. R. Civ. P. 23(a)(3). The indicia of this requirement are summarized in *Sley v. Jamaica Water & Util.*, 77 F.R.D. 391 (E.D. Pa. 1977):

> The typicality requirement functions as a safeguard against interclass conflicts and an assurance that the plaintiff's interests are more or less co-extensive with those of the class. In other words, . . . the class representative's

> claims must be typical in that his or her litigative posture must be sufficiently co-extensive with those of the class such that the class members' causes of action are fully, fairly and vigorously prosecuted.

Id. at 394 (citations omitted). *Accord Cohen v. Uniroyal, Inc.*, 77 F.R.D. at 691; *Sharp v. Coopers & Lybrand*, 70 F.R.D. 544, 548 (E.D. Pa. 1976). As the court observed in *General Telephone Co. of Southwest v. Falcon:*

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

457 U.S. at 157 n.13. *See also* 3B J. Moore, *Moore's Federal Practice*, ¶23.06-2 (2d ed. 1978) (the extent to which this requirement differs, if at all, from other requirements of Rule 23(a) is unclear).

While the focus is on the relatedness of the named plaintiffs' claims and those of the class members, the harm suffered by the named plaintiffs may differ in degree from that suffered by other members of the class so long as the harm suffered is of the same type. *McQuilken v. A. & R. Development Corp.*, 576 F.Supp. 1023, 1029 (E.D. Pa. 1983). "[C]laims [are considered] typical when the 'essence' of the allegations concerning liability, and not the particularities, suggest adequate representation of the interests of the proposed class members." *Peil v. Speiser*, 97 F.R.D. 657, 659 (E.D. Pa. 1983) (quoting *Piel v. National Semiconductor Corp.*, 86 F.R.D. at 371). In addition, "a plaintiff's claim is typical if it arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory." *Paskel v. Heckler*, 99 F.R.D. at 84 (citation omitted).

As previously demonstrated, the plaintiffs' claims raise issues harmonious with all class members as to the common issues of liability upon theories of negligence, strict liability, breach of warranty, intentional tort, concert of action and civil conspiracy. As a consequence, the named plaintiffs stand in a similar position as all other members of the class, in satisfaction of this subdivision.

4. *Adequacy of Representation*

The final requirement of Rule 23(a)(4) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In *Wetzel v. Liberty Mutual Insurance Co.*, the Third Circuit identified the elements of adequacy of representation as follows: "Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." 508 F.2d at 247 (citation omitted). *Accord Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3rd Cir. [1977]), *cert. denied*, 434 U.S. 1086 (1978). The burden is on the defendant to demonstrate that the representation will be inadequate. *Lewis v. Curtis*, 671 F.2d 779, 788 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982).

The named plaintiffs are represented by counsel who are very experienced with class action litigation and throughly familiar with property damage and mass disaster litigation.[10] Identical or similar evidence will be proffered by each plaintiff as to all of the fundamental liability issues in this action. Plaintiffs' interests are sufficiently aligned with those of the class members they seek to represent. Therefore, this element of Rule 23(a)(4) is satisfied as well.

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10. *See* notes 3 & 5 *supra*. Indeed, the quality of all counsel associated with this case is a factor in the Court's determination that this case can be properly managed as required by Rule 23(b)(3)(D).

B. Rule 23(b)(3)

Rule 23(b)(3)[11] applies to class certification of actions primarily seeking money damages. Rule 23(b)(3) requires that (1) common questions of law or fact raised by the litigation in which class determination is being sought predominate over individual questions and (2) that class treatment be superior to other procedures available for handling the damage claims in question. Fed. R. Civ. P. 23(b)(3).

In determining whether the relevant criteria of Rule 23(b)(3) have been met, the Third Circuit Court of Appeals has established the following quidelines:

> The predominance finding requires at a minimum the identification of the legal and factual issues, common and diverse, and an identification of the class members to which those relate. . . . The superiority finding requires at a minimum (1) an informed consideration of alternative available methods of adjudication of each issue, (2) a comparison of

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11. Rule 23(b) provides in relevant part:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for, the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

fairness to all whose interests may be involved between such alternative methods and a class action, and (3) a comparison of the efficiency of adjudication of each method.

Katz v. Carte Blanche Corporation, 496 F.2d at 756-57, *cited with approval in Bogosian v. Gulf Oil Corp.*, 561 F.2d at 448. Assuming that the analysis of these points is correct, the district court has broad discretion to grant or deny class certification. *Katz v. Carte Blanche Corporation*, 496 F.2d at 757; *Bogosian v. Gulf Oil Corp.*, 561 F.2d at 448.

1. *Predominance*

In assessing whether common questions predominate, most courts have adopted a pragmatic approach which emphasizes how efficient class treatment will be, the significance of the common questions, and whether class certification would result in the serious distortion of the lawsuit. 3B J. Moore, *Moore's Federal Practice* ¶23.45[2] (1978). Professors Wright and Miller state that when "common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis." 7A C. Wright and A. Miller, *Federal Practice* and *Procedure*, §1778, at 53 (1972). Several courts have found class certification to be appropriate "where common issues important to the litigation can be resolved on a class-wide basis even though the common issues may not be dispositive." *McQuilken v. A & R Development Corp.*, 576 F.Supp. at 1031.

This pragmatic approach is implicit in the analytical framework utilized in *Bogosian v. Gulf Oil Corp*. Under *Bogosian*, the determination of the appropriateness of class certification of damage claims under Rule 23(b)(3) involves a three-part analysis of the basic elements of civil damage claims. Those elements consist of: (1) violation of law; (2) fact of injury; and (3) damages. 561 F.2d at 449, 454-56. *See also In re Glassine and Greaseproof Paper Antitrust Litigation*, 88 F.R.D. 302, 306-07 (E.D. Pa. 1980); *Hedges Enterprises, Inc. v. Continential Group*, 81

F.R.D. at 473-76. Restated in terms of recovery in tort, it is necessary to demonstrate breach of a legal duty; causation between the violation and injury to the plaintiff, including injury in fact and proximate cause; and damages. These principles of analysis have been recognized in tort class certification decisions. *See, e.g., In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718, 721-23 (E.D.N.Y. 1983) ("*Agent Orange*"); *Three Mile Island*, 87 F.R.D. at 439-40.

The first element to be analyzed to determine whether common questions of law or fact predominate over individual ones pursuant to Rule 23(b)(3) is the alleged violations of law as to which class certification is sought. As discussed previously, the complaint alleges six claims for damages: negligence, strict liability, breach of warranty, intentional tort, concert of action and civil conspiracy.

These claims, as noted, arise out of the same common nucleus of operative facts relating to defendants' conduct and the nature of asbestos products. Common questions relating to the hazards of asbestos, the knowledge of the defendants of the hazards, industry policies and practices and defendants' failure to warn and to test are at the core of all the damage claims for relief, and will dominate other issues at trial, regardless of how defendants' conduct is characterized in terms of a specific tort.

The second element of the *Bogosian* analysis relevant to determining whether common questions of law or fact predominate over individual ones under Rule 23(b)(3) is the question "fact of injury" or "impact". The issue of impact, or as it is more commonly known, causation, focuses on the effects of the defendants' conduct on individual members of the class and may be proved on a classwide basis. The Third Circuit Court of Appeals has stated:

> Since, as we have indicated, the second aspect of fact of damage is a simple concept of causation, any evidence which is logically probative of a loss attributable to the violation will advance plaintiff's case. There is absolutely no requirement that the loss be personal or unique to plaintiff,

> so long as the plaintiff has suffered loss in his business or property, for as we have noted, this second aspect of fact of damage is not concerned with any policy of limiting liability. Thus, when [a] . . . violation impacts upon a class of persons who do have standing, *there is no reason in doctrine why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual.*

Bogosian v. Gulf Oil Corp., 561 F.2d at 454 (emphasis added).

In the instant case, defendants' alleged misconduct has had broad, pervasive effects on the school class. Plaintiffs allege that as a result of defendants' failure to warn the nation's elementary and secondary schools of the hazards of asbestos and asbestos-containing products, the school class installed large quantities of friable asbestos material in school buildings. Because of the alleged grave health hazard posed by asbestos, schools have undertaken asbestos abatement remedial action to eliminate the hazard and have incurred enormous financial costs as a result. Thus, plaintiffs' proposed proof of impact under the above formulation, that is, demonstration of a general effect in the form of the creation of the hazard and specific proof of expenditures, falls within the *Bogosian* guidelines.

The second element of causation, proximate or legal cause raises primarily a question of law relating to the ambit or scope of legal liability under the law of torts. W. Prosser, *Law of Torts*, § 42, at 244 (4th ed. 1971). This legal issue can be resolved on a classwide basis without involving individualized, class-member by class-member proof.

Finally, "the 'overwhelming weight of authority' holds that the need for individual damages calculations does not diminish the appropriateness of class action certification where common questions as to liability predominate." *Wolgin v. Magic Marker Corp.*, 82 F.R.D. 168, 176 (E.D. Pa. 1979) (quoting 5 H. Newberg, *Newberg on Class Actions* § 8824(b), at 879 (1977)).

2. *Superiority*

The concept of superiority essentially involves a value judgment which takes into account a number of competing interests. As the Third Circuit stated in *Katz v. Carte Blanche Corporation:*

> Superiority must be looked at from the point of view (1) of the judicial system, (2) of the potential class members, (3) of the present plaintiff, (4) of the attorneys for the litigants, (5) of the public at large and (6) of the defendant. The listing is not necessarily in order of importance of the respective interests. Superiority must also be looked at from the point of view of the issues.

496 F.2d at 760.

In my view, the school asbestos litigation is uniquely suitable to class action treatment. The bench, bar and public at large are only too well aware of the staggering costs that the asbestos personal injury litigation has generated. Clearly, classwide disposition of at least some of the issues in this litigation, instead of case-by-case adjudication, would realize great savings in litigation costs. Instead of hundreds or thousands of school asbestos cases in separate forums, the litigation would be concentrated in a single forum, thereby economizing litigation expenses. Moreover, there would be one set of attorneys for both sides resulting in significant savings in attorneys' fees. In this case, "with the presence of a common core which predominates, considerations of judicial efficiency and economy, overall expense and uniformity will be furthered by permitting this case to proceed as a class action." *Sharp v. Coopers & Lybrand*, 70 F.R.D. at 548.

While the Advisory Committee Notes caution against certifying mass tort cases under Rule 23(b)(3), 39 F.R.D. 69, 103 (1966), this case involves a mass tort relating to property damage rather than personal injury. *McQuilken v. A & R Development Corp.*, 576 F.Supp. at 1032. Hence, many of the jurisprudential considerations, such as an injured plaintiff's right to choose his or her forum and to choose his or her counsel, as well as the

unique characteristics of causation and injury which have led courts to hesitate to certify mass tort cases, *In re Northern Dist. of Cal., Dalkon Shield, etc.*, 693 F.2d 847, 852-54 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) (citing cases) ("*Dalkon Shield*"); *Delaney v. Borden, Inc.*, 99 F.R.D. 44, 44-45 (E.D. Pa. 1983); *Sanders v. Tailored Chemical Corp.*, 570 F. Supp. 1543, 1543 (E.D. Pa. 1983), are not present in this case. *See* 7A C. Wright and A. Miller, *Federal Practice and Procedure*, § 1783, at 115-16 (1972).

3. 23(b)(3)(A-D)

Having carefully considered the factors which are set forth in Fed. R. Civ. P. 23(b)(3)(A-D), I am convinced that the certification of a class under Rule 23(b)(3) is appropriate in this case.[12]

The disposition of this litigation under a Rule 23(b)(3) class allows those school districts who wish to pursue individual actions to do so. Many of the larger school districts, such as Los Angeles and Chicago, have a significant interest in pursuing their own actions. However, many more thousands of districts will be benefited by being relieved of the onerous burden of bringing a complex action which could consume in costs more than the recovery anticipated.

To date, there are approximately 50 cases filed in state and federal courts. Only one has proceeded to judgment. Thus, the certification of this action comes at a time when the vast majority of the class members can make a meaningful decision to participate or to opt out.

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12. Rule 23(b)(3)(A-D) provides in relevant part:
The matters pertinent to the findings [of predominance and superiority] include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Whether the Eastern District of Pennsylvania offers any unique advantage as a forum for litigating this case is problematical. However, if this case is to be litigated as a nationwide class, no other forum has any special advantage which augers for litigating elsewhere.

One matter, bearing on the manageability of this litigation, which defendants raise in opposition to any type of class certification, is the applicability of the state law of 54 jurisdictions. At first blush, this aspect of the litigation would seemingly prevent nationwide class certification. *See Brummett v. Skyline Corp.*, No. C 81-0103(B), slip op. at 9-10 (W.D.Ky. April 11, 1984); *Harrigan v. United States*, 63 F.R.D. 402, 405 (E.D. Pa. 1974). However, on further reflection, the problem is not nearly so complex. First, there is substantial duplication among the various jurisdictions as to the applicable law. For example, as to negligence, 51 jurisdictions are in virtual agreement in that they apply the Restatement (Second) of Torts § 388. As to strict liability, the basic test is Restatement (Second) of Torts § 402(A) that one who sells a product in a defective condition unreasonably dangerous to the user is liable. Forty-seven jurisdictions have adopted strict liability theories and all of them start with the concept of a defective product. In addition, plaintiffs have represented that they will direct discovery and trial briefs to meet the most stringent tests of liability. Finally, as the need arises, subclasses can be created to account for variances pursuant to Rule 23(c)(4).[13] *Fox v. Prudent Resources Trust*, 69 F.R.D. at 77.

This is not to suggest that I believe that managing this litigation is wholly without difficulty, as it most assuredly is not. But, at this point, I believe that the management problems can be overcome.[14] Notwithstanding the difficulty, "the proposed class action appears superior to the only existing alternative,

13. Rule 23(c)(4) provides in relevant part:

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

14. *See* note 10 *supra*.

which is repetitive individual litigation." *Wolgin v. Magic Marker Corp.*, 82 F.R.D. at 179.

C. Rule 23(b)(1)(B)

Plaintiffs contend that this action meets the requirements of a Rule 23(b)(1)(B) mandatory class under the so-called "limited fund" standard. Plaintiffs' argument in this regard consists of two strands. On the one hand, plaintiffs argue that due to the costs involved in meeting potential claims, defendants' assets may be exhausted before all claimants could be compensated.[15]

On the other hand, plaintiffs assert that there is a substantial possibility that early awards of punitive damages will impair or impede the ability of future claimants to obtain punitive damages. Under this theory, it is not the total assets of the defendants that places a limitation on future plaintiffs' ability to obtain awards of such damages; rather, it is the very real possibility that subsequent plaintiffs will find themselves in litigation in which defendants "will nave been found [by the courts] to have been sufficiently punished," Williams, J., *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 333 ("*Mass Tort Class Actions*"), such that further awards of punitive damages would only result in "overkill". *See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

Two circuit courts which have considered Rule 23(b)(1)(B) certification in the context of mass torts have rejected it. In *Dalkon Shield*, the Ninth Circuit, while not specifically foreclosing the possibility of a (b)(1)(B) class, nonetheless held that (b)(1)(B) certification is proper only when "separate punitive damages claims *necessarily* will affect later claims." 693 F.2d at 852 (emphasis added). The Eighth Circuit, in *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 459

15. While plaintiffs have advanced this argument, they have not seriously pursued it, hence the Court declines to address it on the merits. In addition, no substantive evidence is before the Court which demonstrates that the combined assets of the defendants would be insufficient to meet the plaintiffs' claims.

U.S. 988 (1982) ("*Skywalk*"), concluded that certification under (b)(1)(B) enjoined pending state proceedings and therefore violated the Anti-Injunction Act, 28 U.S.C. § 2283 (1982).[16] The court rejected the argument that a limited punitive damages fund brought the class within the "in aid of [the court's] jurisdiction" exception to the Anti-Injunction Act. *Skywalk*, 680 F.2d at 1182. The court stated that, "the class has an uncertain claim for punitive damages against defendants who have not conceded liability. The claim does not qualify as a limited fund. . . ." *Id.*

The most recent analysis of (b)(1)(B) certification is contained in Chief Judge Jack Weinstein's opinion in *Agent Orange*. In formulating a standard against which to evaluate limited fund class certifications, Judge Weinstein adopted a "substantial probability" criteria, i.e., "less than a preponderance but more than a mere possibility." *Agent Orange*, 100 F.R.D. at 726. Applying this standard, Judge Weinstein concluded that the amount of compensatory damages and punitive damages, if allowed, would not exceed defendants' assets.

Having so found, Judge Weinstein nonetheless went on to conclude that a limited fund mandatory class should be established on the issue of punitive damages. Judge Weinstein reasoned as follows:

> [T]here is a substantial probability that limited punitive damages may be allowed. If they are, it would be equitable to share this portion of the possible award among all plaintiffs who ultimately recover compensatory damages. Yet, if no class is certified under Rule (b)(1)(B), non-class members who opt out under Rule 23(b)(3) would conceivably receive all of the punitive damages or, if their cases are not completed first, none at all.

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16. The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment." 28 U.S.C. § 2283.

> It is axiomatic that the purpose of punitive damages is not to compensate plaintiffs for their injury, but to punish defendants for their wrongdoing. In theory, therefore, when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction. . . . There is, therefore, a substantial probability that 'adjudication with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudication.'

Id. at 728 (citations omitted).

Judge Weinstein's analysis of Rule 23(b)(1)(B) certification substantially comports with Judge Heaney's dissenting opinion in *Skywalk* which states in relevant part:

> Apart from the defendants' capacity to pay punitive damages, there is surely some limit imposed by law on the amount for which they can be held liable for a single wrongful act or course of conduct. Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process.

680 F.2d at 1188 (citations omitted) (Heaney, J., dissenting). Judge Heaney's opinion goes on to conclude that "[t]he justifications for imposing punitive damages include expressing society's disapproval of outrageous conduct, deterring such conduct in the future, and providing incentives for private civil enforcement. Each of these purposes is advanced by the district court's class certification here. Thus, a class-wide calculation of punitive damages would be proper." *Id.* at 1190 (citations omitted) (Heaney, J., dissenting).

While the issue concerning the Anti-Injunction Act did not arise in *Agent Orange*, *see* 100 F.R.D. at 726, it was, as noted previously, the *ratio decidendi* of the *Skywalk* opinion. With due deference to the other members of the panel, I find Judge Heaney's discussion, in his dissent, of the interaction between a mandatory punitive damages class under Rule 23(b)(1)(B) and the requirements of the Anti-Injunction Act to be the better view. As Judge Heaney states:

> A mandatory class action, of course, has a restrictive effect on related proceedings in any other court—state or federal. This is because, by definition, members of such a class cannot pursue independent litigation of class claims . . . .
>
> Here, the necessary restrictive effects of the mandatory class action are twofold. The first restrictive effect is that class members would not be able to pursue a punitive damage claim in an independent action. Such a restriction is absolutely necessary to the district court's jurisdiction over this class issue due to the applicable state law on punitive damages.

680 F.2d at 1191-92 (citations omitted) (Heaney, J., dissenting).[17]

In addition to their reliance on the decisions of the Eighth and Ninth Circuit Courts of Appeal, parties to this litigation have also raised constitutional and policy considerations in opposition to a mandatory class. First, it is argued that this Court is bound, under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), by the decision of the Supreme Court of Pennsylvania in *Klemow v. Time, Incorporated*, 466 Pa. 189, 352 A.2d 12, *cert. denied*, 429 U.S. 828 (1976). In *Klemow*, a consumer class action involving nonresident plaintiffs, the Pennsylvania Supreme Court stated: "Because the jurisdiction of the courts of the Commonwealth is

17. Under the applicable law of Missouri, it was unclear whether state law permitted more than one award of punitive damages. *Skywalk*, 680 F.2d at 1187.

territorially limited, the class may consist only of Pennsylvania residents. The class may also include non-residents who submit themselves to the jurisdiction of the state courts." *Id.* at 197, n.15, 352 A.2d at 16 n.15 (citations omitted). *See also Note, Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718 (1979).

Defendants conclude that since Pennsylvania does not purport to assert jurisdiction over non-residents in a mandatory class, the federal court is, therefore, precluded from doing so. Apart from the fact that the parties cite no case decided on the basis of *Erie* and *Klemow*, their argument fails to account for the Supreme Court's holding in *Hanna v. Plumer*, 380 U.S. 460 (1965). In *Hanna*, the issue was whether the Massachusetts service of process rule would be applied rather than Fed. R. Civ. P. 4(d)(1). The Court stated:

> [Defendant] . . . suggests that the *Erie* doctrine acts as a check on the Federal Rules of Civil Procedure, that despite the clear command of Rule 4(d)(1), *Erie* and its progeny demand the application of the Massachusetts rule. Reduced to essentials, the argument is: (1) *Erie*, as refined in [*Guaranty Trust Co. of New York v.*] *York*, [326 U.S. 99 (1945)], demands that federal courts apply state law whenever application of federal law in its stead will alter the outcome of the case. (2) In this case, a determination that the Massachusetts service requirements obtain will result in immediate victory for respondent. If, on the other hand, it should be held that Rule 4(d)(1) is applicable, the litigation will continue, with possible victory for petitioner. (3) Therefore, *Erie* demands application of the Massachusetts rule. The syllogism possesses an appealing simplicity, but is for several reasons invalid.

Id. at 466. *See also Rees v. Mosaic Technologies, Inc.*, [742 F.2d 765, 767 (3d Cir. 1984)].

The *Hanna* Court refused to apply the *Erie* "outcome determinative" test, noting that the fundamental flaw in the defendant's "syllogism" was "the incorrect assumption that the

rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure". 380 U.S. at 469-70. Rather, in situations involving the Federal Rules, the appropriate inquiry is as follows:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Id. at 471. Hence, it is standard practice for federal courts, pursuant to Rule 23, to exercise jurisdiction over national class actions. *See, e.g., Zeffiro v. First Pa. Banking & Trust Co.*, 96 F.R.D. 567 (E.D. Pa. 1983).

In addition to the *Erie* argument, various parties maintain that a mandatory class raises concerns related to the tenth amendment.[18] The thrust of the argument is that the management of the public schools is at the heart of the police powers traditionally committed to local control. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972), and is, therefore, beyond the purview of the federal courts.

It, of course, goes without saying that a federal court should be extremely circumspect when the facts of the case before it arguably implicate the tenth amendment. However, in the present case, I have concluded that the prohibited line has not been crossed. Firstly, the tenth amendment concern as expressed in *National League of Cities v. Usery*, 426 U.S. 833 (1976), has been considerably undermined by more recent cases such as *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) and *EEOC v. Wyoming*, 460 U.S. 226

18. The tenth amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

(1983). Secondly, the intrusion upon the interests of the school districts are minimal. Only the punitive damages issue will be conducted pursuant to a mandatory class. Lastly, the federal interest inherent in asbestos abatement is apparent from the nationwide scope of the problem and the actions that Congress has taken with respect thereto.

It is apparent that there is a substantial possibility that early awards of punitive damages in individual cases will impair or impede the ability of future claimants to obtain punitive damages. The reality of such impairment has been recognized by commentators and courts. *See* Wright, *The Successful Use of the Class Action Device*, 52 UMKC L. Rev. 141, 144-45 (1984); Seltzer, *Mass Tort Punitive Damages*, 52 Fordham L. Rev. 37, 61, 72-73 (1983); Note, *Mass Accident Class Actions*, 96 Harv. L. Rev. 1143, 1157 (1983); *Mass Tort Class Actions*, 98 F.R.D. at 333 (1983); *Restatement (Second) of Torts*, §908, comment e, at 467 (1979). *See also Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828, 838 (3d Cir. 1983); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d at 839; *Agent Orange*, 100 F.R.D. at 725; *In re Related Asbestos Cases*, 566 F.Supp. 818, 822 (N.D. Ca. 1983); *Rosener v. Sears Roebuck & Co.*, 110 Cal.App. 3d 740, 758-59, 168 Cal. Rptr. 237 (1980).

"A fundamental aspect of justice is parity of treatment. Persons similarly situated and aggrieved should be similarly treated." *Payton v. Abbott Labs*, 83 F.R.D. at 390. While the ability of the courts to deal with social problems of great magnitude is not unlimited, "it has been the tradition of the common law to adapt." *Id.* An observation made by another district court in certifying a (b)(1)(B) limited fund class seems particularly apropos in the present case: "Faced with contradictory nonbinding authority, a court must select that course of action which appears at the time to better assure equality of treatment for all litigants." *Coburn v. 4-R Corp.*, 77 F.R.D. at 46.

While the question is not without difficulty, I conclude that a mandatory class on the issue of punitive damages should be conditionally certified under Rule 23(b)(1)(B). In so doing, I

adopt the suggestion of Judge Heaney in *Skywalk* that any litigant who chooses to opt out of the Rule 23(b)(3) class will be permitted to settle punitive damage claims, and that the defendants will receive credit for any such settlements when and if there is a classwide award of punitive damages. 680 F.2d at 1184-85 (Heaney, J., dissenting). Bearing in mind that no plaintiff has a legal right to punitive damages, the arrangement herein outlined would appear to be the least intrusive means of assuring fairness and equity to all parties.

D. Rule 23(b)(2).

Fed. R. Civ. P. 23(b)(2) provides that: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The complaints request two types of equitable relief: (1) mandatory injunctive relief in the form of asbestos abatement remedial action, and (2) restitution for expenditures already incurred by schools to remedy asbestos hazards.

Three forms of mandatory injunctive relief are requested. First, the complaints seek direct abatement action, including any necessary testing, inspection, analysis, removal of friable asbestos, and containment and/or replacement action warranted under the circumstances. Second, where containment action has already been taken by the schools, plaintiffs seek containment monitoring services consisting of maintenance of contained asbestos materials which remain in the schools under appropriate abatement practices. Third, the complaints seek medical detection/surveillance and monitoring services to identify and monitor children and school employees who may have been exposed to school asbestos.

In addition, plaintiffs seek equitable restitution for the costs of asbestos abatement remedial action already undertaken. They seek reimbursement under this theory for the monies expended performing a duty which they claim was the responsibility of the defendants.

Despite the ingenuity of plaintiffs' claims for equitable remedies, this case remains at bottom, one for legal damages. The Advisory Committee Notes to Rule 23(b) states that "[t]he [(b)(2)] subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." 39 F.R.D. at 102.

Plaintiffs attempt to sidestep this requirement of Rule 23(b)(2) by casting their prayer for relief as restitution rather than money damages. The difference between the two remedies may be summarized as follows:

> The damages recovery is to compensate the plaintiff, and it pays him, theoretically, for his losses. The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep.

D. Dobbs, Remedies, § 4.1, at 224 (1973).

The plaintiffs' argument that a request for a payment of future remedial expenses is equitable in nature has been rejected by the Court of Appeals for the Third Circuit. "A plaintiff cannot transform a claim for damages into an equitable action simply by asking for an injunction that orders the payment of money." *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir.) (citations omitted), *cert. denied*, 456 U.S. 972 (1982). *Accord Three Mile Island*, 87 F.R.D. at 442.

Whether some type of equitable relief may be required in specific cases cannot at this stage of the litigation be clearly ascertained. It is, however, well settled that certification under 23(b)(3) does not preclude the granting of appropriate equitable relief. 7A C. Wright and A. Miller, *Federal Practice and Procedure*, § 1784, at 127 (1972) ("a federal court should [be] free to experiment in awarding relief under Rule 23. It has the tools to shape the remedy to meet the exigencies of each case. . . ."). However, the incidental need for limited equitable remedies cannot sustain certification under Rule 23(b)(2). *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 343 (E.D. Pa. 1976). *Cf. Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d at 253

(employment discrimination class action certifiable under (b)(2) and (b)(3) should be certified as (b)(2)); *Connor v. Highway Truck Drivers & Helpers*, 68 F.R.D. 370, 375 (E.D. Pa. 1975) (monetary relief incidental to equitable relief).

E. Class Notice

The final consideration for the Court concerns the subject of notice to the class. Fed. R. Civ. P. 23(c)(2) provides:

> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each members that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

In the present case, the best notice practicable would be obtained by a first class mailing. *See Piel v. National Semiconductor Corp.*, 86 F.R.D. at 375. The school districts and private school members of the class may be readily identified via the resources of national and state school board associations. In addition to noticing the school boards, appropriate notice should be provided in trade journals as well as periodicals of general distribution. Clearly, the public at large has a substantial interest in whether or not the school boards opt out of the 23(b)(3) class as well as in the progress of the litigation concerning the punitive damage claims. The cost of notice will be borne by the plaintiffs.

An appropriate Order follows.

Order No. 20 of the United States District Court for the Eastern District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION

MASTER FILE NO. 83-0268
THIS DOCUMENT RELATES TO: ALL ACTIONS

ORDER NO. 20

AND NOW, this 28th day of September, 1984, for the reasons set forth in the foregoing Memorandum, it is hereby ORDERED that:

1. Plaintiffs' Motion pursuant to Fed. R. Civ. P. 23(b)(1)(B) for Class Certification on the limited issue of punitive damages is GRANTED.

2. Plaintiffs' Motion for Class Certification pursuant to Fed. R. Civ. P. 23(b)(2) is DENIED.

3. Plaintiffs' Motion for Class Certification pursuant to Fed. R. Civ. P. 23(b)(3) is GRANTED.

4. It is FURTHER ORDERED that plaintiffs who opt out of the Rule 23(b)(3) class will be permitted to settle punitive damages claims and defendants thus settling will be given credit for such amounts when, and if, punitive damages are awarded.

5. The class is defined as follows:

> All entities which own or operate in whole or in part any public educational facilities, as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2854, throughout the United States; and all entities which own or operate in whole or in part any non-public, non-profit elementary or secondary educational facilities, including entities

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with religious affiliations, in the United States, to the extent that such non-profit entities are owned or operated by one or more non-profit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

6. Any provision of Order No. 7, dated April 13, 1984 which is inconsistent with the provisions of this Order (Order No. 20) is hereby VACATED.

7. It is further ORDERED that plaintiffs shall forward a draft of their proposed notice form to the Court and the defendants on or before October 30, 1984. Any objections to the proposed notice shall be filed on or before November 15, 1984.

BY THE COURT:

/s/ James Kelly

JAMES McGIRR KELLY, *J.*

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Memorandum and Order No. 39 of the United States District Court for the Eastern District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION

MASTER FILE NO. 83-0268
THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM AND ORDER

ORDER NO. 39

AND NOW, this 28th day of February, 1985, upon consideration of the motion of National Gypsum Company and United States Gypsum Company for an Order temporarily restraining Anderson County Board of Education from individually litigating its claim to punitive damages against these defendants, and after telephone conference with counsel and with the Honorable Robert Murrian, United States Magistrate in the United States District Court for the Eastern District of Tennessee, it is ORDERED that:

1. Anderson County Board of Education is enjoined from litigating its claim to punitive damages against these defendants in any forum other than this court until such time as the court can determine whether to enjoin explicitly all class members from individually litigating their claims to punitive damages.

2. In the case captioned *Anderson County v. United States Gypsum Company and National Gypsum Company*, Civil Action No. 3-83-511 (E.D. Tenn.), Anderson County Board of Education is enjoined from introducing any evidence that is relevant solely to plaintiff's punitive damages claim, or arguing the punitive damages claim to the jury.

3. A hearing on this motion shall be heard on March 27, 1985 at 10:00 a.m. in Courtroom 8A, United States Courthouse, Philadelphia, Pennsylvania.

BY THE COURT:

/s/ James Kelly

JAMES McGIRR KELLY, J.

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Memorandum of the United States District Court for the Eastern District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION

MASTER FILE NO. 83-0268
THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM AND ORDER

KELLY, *J.* AUGUST 2, 1985

Presently before me is stipulating defendants'[1] motion for a preliminary injuction.[2] Stipulating defendants seek to enjoin Spartanburg County, South Carolina School District Seven (School District) whose case is listed for trial on August 5, 1985,[3] from: introducing any evidence that is relevant solely to plaintiffs' punitive damages claims; arguing the punitive damage claim to the jury; and requesting that the jury be charged on the issue of punitive damages.

In my Memorandum and Order of September 28, 1984, 104 F.R.D. 422, I certified the class as to punitive damages, under Fed. R. Civ. P. 23(b)(1)(B) which, although allowing a plaintiff class member to opt out of the punitive damage class, I restricted the remedies available to the party who opted out by prohibiting separate litigation of punitive damages.[4] 104 F.R.D. at 438. The

1. National Gypsum Company and United States Gypsum Company. Although W. R. Grace & Co. was included in the original motion, because the instant matter only concerns the two above mentioned firms, W. R. Grace & Co. was withdrawn as a movant on the instant matter before me.

2. On August 1, 1985 a telephone conference was afforded the parties concerning a temporary restraining order in this matter; the parties agreed that the telephone conference, in which argument was entertained by the court, would be in place of a hearing for preliminary injunction. The parties agreed a separate hearing for a preliminary injunction is not required.

3. *Spartanburg County School District Seven v. National Gypsum Company and United States Gypsum Company*, No. 83-1744-14 (D.S.C.).

4. I imposed no restriction as to the compensatory claims.

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essence of my ruling was fairness to the defendants as well as to the plaintiffs.

The purpose of punitive damage claims "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1978). Plaintiff School District has contended that South Carolina law would apply to the products liability suit which was brought in the District Court of South Carolina because of the various contacts plaintiff has with the state. I do not rule on this matter, but for the instant matter I will assume that South Carolina law applies. Plaintiff School District argues in its brief in opposition to the instant motion that South Carolina law is distinguishable from the general premise of punitive damages. Plaintiff suggests that punitive damages under South Carolina law are compensatory in nature, in that it compensates for a right of a party which is taken away. Plaintiff cites, *inter alia*, *Oliver v. Columbia, N. & L. R. Co.*, 43 S.E. 307 (S.C. 1902) to support its position. I do not agree with plaintiff's argument. The Supreme Court of South Carolina in *Oliver* overruled exceptions to the trial court's charge to the jury concerning punitive damages. *Id.* at 320-323. The portion of the jury charge which was the focus [sic] the exception stated:

> The second kind of damages, called 'punitive damages', are sometimes spoken of as 'vindictive damages; and 'exemplary damages.' Indeed, they are sometimes referred to as 'smart money' and 'blood money.' They are called 'punitive damages' because of the theory that such damages will act as a sort of punishment of the defendant for such wrongdoing; not only as a punishment for past wrongdoing, but to deter the defendant and others in similar business from repeating such wrongdoing in the future. Such damages are allowed in law, and they operate almost like fines in the criminal court.

> They are allowed not so much to compensate the plaintiff or to enrich the plaintiff, but for the public good, to punish the defendant.
>
> * * * *
>
> Therefore, gentlemen, if in this case it is established to your satisfaction, by the preponderance of the evidence, then your verdict would be a sum of money representing not only actual injury sustained, or compensation for this injury, but also an additional amount, as I have said before, to punish the defendant, to make an example, so as to keep the defendant and others in the same kind of business from such wrongdoing, if such be proven.

Oliver at 320-321.

The Supreme Court of South Carolina in *Oliver* commented on the jury charge, indeed upholding it:

> 'Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; and, indeed, it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but, in addition thereto, operating as a deterring punishment to a wrongdoer and as a warning to others.' While, therefore, exemplary damages are not awarded 'as a fine or penalty for a public wrong,' they are awarded as a 'punishment' to the wrongdoer for the willful invasion of a private right, 'and as a warning to others.' And this, as Judge Benet charged, is 'for public good, '—an example—' for the benefit of others.' These two exceptions are overruled.

Id. at 321-322 (citations omitted).

Indeed, all the court was stating was that the private person/party who was injured had the right/standing to sue for punitive damages, rather than the general public. However, the purpose of punitive damages is to provide for the benefit of the public. *See also Rogers v. Florence Printing Company*, 106 S.E. 2d 258, 261 (S.C. 1958) (Individual has standing to bring punitive damage claim rather than public, punitive damages are gauged

or allocated as to the "willfulness" of a defendant and operate to punish the wrongdoer, and warn others.)

In certain situations where wanton or intentional wrongdoing are found, punitive damage claims may arise to a "right" of a plaintiff; however, equally balanced against this "right", is the obligation that the defendant be punished fairly. *In Re Asbestos School Litigation*, 104 F.R.D. 422, 434-438 (E.D. Pa. 1984). Fairness is the conerstone of equity. Thus, the fairness which defendant receives in not being subject to successive claims to punish [sic] for purported wrongs also benefits the many plaintiffs who may be late comers seeking punitive damages when the "pot of gold is gone".[5]

Indeed, the fairness which I seek in this action concerning punitive damages is analogous to the equitable devices such as an interpleader action or bill of peace. *Cf. Boice v. Boice*, 48 F. Supp. 183, 186 (E.D. Pa. 1943) ("Interpleader is a well-established equitable remedy . . ." *quoting* Judge Maris in *Metropolitan Life Ins. Co. v. Mason*, 21 F. Supp. 704, 706 (E.D. Pa. 1937)) *aff'd*. 135 F.2d 919 (3d Cir. 1943).

The Supreme Court in *State Farm Fire & Casualty v. Tashire*, 386 U.S. 523 (1967) observed:

> There are situations, of a type not present here, where the effect of interpleader is to confine the total litigation to a single forum and proceeding. One such case is where a stakeholder, faced with rival claims to the fund itself, acknowledges — or denies — his liability to one or the other of the claimants. In this situation, the fund itself is the target of the claimants. It marks the outer limits of the controversy. It is, therefore, reasonable and sensible that interpleader, in discharge of its office to protect the fund, should also protect the stakeholder from vexatious and multiple litigation.

Id. at 534. (footnote omitted)

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5. Either the assets of defendants will be exhausted, or courts will hold that defendants have been sufficiently punished. *See In Re School Asbestos Litigation*, 104 F.R.D. at 434.

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The imposition of the injunction implicit in my Pretrial Order No. 20, precluding separate suits for punitive damages is as much a product of fairness and due process as it is of equity.

The plaintiffs[6] here contend that the United States Supreme Court holding in *Phillips Petroleum Company v. Shutts*, 53 U.S.L.W. 4879 (June 26, 1985) compels the denial of the instant motion. The Court in *Shutts* was faced, *inter alia*, with the issue of whether or not a state court presiding over a class action for damages can exercise jurisdiction over out of state class plaintiffs who do not voluntary subject themselves to the court's jurisdiction. The Court held:

> [T]hat a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law,[3] it must provide minimum procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'. The notice should describe the action and the plaintiff's rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning and 'opt out' or 'request for exclusion' form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

3 Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. *We intimate no view concerning other types of class action lawsuits, such as those seeking equitable relief*. Nor, of course, does our discussion of personal jurisdiction address class actions where the jurisdiction is asserted against a *defendant* class.

6. Including the class representative Barnwell School District.

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Id. at 4883 (citation omitted) (emphasis added and in original).

The caveat expressed by the *Shutts* Court in footnote three suggests possible variances of the obligations plaintiffs may be burdened with to fulfill due process where the relief sought is different than compensatory damages. Here the 23(b)(1)class for punitive damages does not preclude opting out, but rather precludes the party which opts out from individually litgating punitive damages. Punitive damages, although an ancient legal remedy, is more similar to equitable relief in that it seeks to provide for a public good as does a criminal fine. Indeed, the purpose of punitive damages is punishment and the coercive effect it may have on the rest of society. The fact that the theory of punitive damages developed on the legal side of jurisprudence rather than the equity side is not sufficient to categorize it with a suit seeking compensatory relief such as the matter in *Shutts*. The compensatory damages portion of this class action provides all the safeguards required by the *Shutts* Court. The punitive damages portion does not provide for separate litigation outside the class. Moreover, the defendants must be given credit for any punitive damage claim that is settled outside the class. While claims for compensatory damages seek to make a plaintiff whole, and, therefore, certain due process safeguards must be afforded the plaintiff, symmetry of the law would require no less when punitive damages are leveled against a defendant. Because punitive damages seek to punish and set an example, due process would require it be done fairly. In punitive damage actions it is the defendant which is the subject of the action, while in compensatory damages claims, it is the plaintiff's rights which are the subject of the action. I have provided for adequate representation of plaintiffs' cause, and notice will be provided. This is all that due process requires where it is the defendants' rights which are the subject of the punitive damages claims.

An appropriate order follows.

Order No. 52 of the United States District Court for the Eastern District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION

MASTER FILE NO. 83-0268
THIS DOCUMENT RELATES TO: ALL ACTIONS

ORDER NO. 52

AND NOW, this 2nd day of August, 1985, in consideration of the motions of National Gypsum Company and United States Gypsum Company for an Order temporarily restraining and for a preliminary injunction enjoining Spartanburg County, South Carolina School District Seven from individually litigating its claim to punitive damages against these defendants, and the responses filed thereto, and after telephone conference with counsel, for the reasons set forth in the foregoing Memorandum, it is ORDERED that:

1. Spartanburg County, South Carolina School District Seven is enjoined from litigating its claim to punitive damages against these defendants in any forum other than this court until such time as the court can determine whether to permanently enjoin plaintiff here from individually litigating its claim to punitive damages.

2. In the case captioned *Spartanburg County School District Seven v. National Gypsum Company and United States Gypsum Company*, No. 83-1744-14 (D.S.C.) Spartanburg County School District Seven is enjoined from introducing any evidence that is relevant to plaintiff's punitive damages claim, or arguing the punitive damages claim to the jury.

BY THE COURT:

/s/ James M. Kelly

JAMES McGIRR KELLY, J.

Memorandum of the United States District Court for the Eastern District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION

MASTER FILE NO. 83-0268
THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM AND ORDER

KELLY, *J.* SEPTEMBER 19, 1985

For the reasons stated in my Memorandum and Order of August 2, 1985, at the telephone conference of February 28, 1985 and in my Memorandum and Order of September 28, 1984 I will grant defendants National Gypsum and United States Gypsum Company motion for a temporary restraining order and preliminary injunction, enjoining Johnson County Tennessee, Board of Education from individually litigating its claim for punitive damages against these defendants.

An appropriate order follows.

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Order No. 56 of the United States District Court for the Eastern District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION

MASTER FILE NO. 83-0268
THIS DOCUMENT RELATES TO: ALL ACTIONS

ORDER NO. 56

AND NOW, this 19th day of September, 1985 in consideration of the motions of National Gypsum Company and United States Gypsum Company for an Order temporarily restraining and for a preliminary injunction enjoining Johnson County, Tennessee, Board of Education from individually litigating its claim to punitive damages against these defendants, and the responses filed thereto, and after telephone conference with counsel, for the reasons set forth in the foregoing Memorandum, it is Ordered that:

1) Johnson County, Tennessee, Board of Education is enjoined from litigating its claim to punitive damages against these defendants in any forum other than this court until such time as the court can determine whether to permanently enjoin plaintiff here from individually litigating its claim to punitive damages.

2) In the case captioned County of Johnson Tennessee v. U.S. Gypsum Company and National Gypsum Company, Civil Action No. Civ. 2-83-262 (E.D. Tenn.), Johnson County, Tennessee, Board of Education is enjoined from introducing any evidence that is relevant solely to plaintiff's punitive damages claim, or arguing the punitive damages claim to the jury.

BY THE COURT:

/s/ James M. Kelly

JAMES McGIRR KELLY, J.

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Supreme Court, U.S.
FILED
SEP 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-339

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

NATIONAL GYPSUM COMPANY,
UNITED STATES GYPSUM COMPANY, AND
W.R. GRACE & CO,
Petitioners

v.

SCHOOL DISTRICT OF LANCASTER, ET AL,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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September 30, 1986

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INTRODUCTION

All representatives of a plaintiff class of approximately 14,000 public and private school districts in the United States oppose the granting of a writ of certiorari in this case. The only parties seeking certiorari for the Third Circuit's vacation of a Rule 23(b)(1)(B) class for punitive damages claims of school asbestos claimants, and its affirmance of the district court's denial of a Rule 23(b)(2) class for declaratory relief are three of fifty defendants. Indeed, not a single litigant, save these three defendants, seeks these classes at this time.

Class representatives are school districts in Pennsylvania and South Carolina, Tennessee, and California, who filed these consolidated class actions in the United States District Court for the Eastern District of Pennsylvania, on January 17, 1983, March 23, 1983 and May 11, 1984. Defendants are businesses engaged in the asbestos industry as miners, suppliers, contractors, manufacturers or distributors of asbestos or asbestos-containing products. Plaintiffs claim that defendants are responsible for the presence of friable (i.e. easily crumbled) asbestos in their school buildings, and seek compensatory damages for the cost of its removal or other abatement and punitive damages. Defendants' liability is predicated entirely on the law of the several states, including such theories of liability as negligence, strict liability, breach of warrant and conspiracy.

The District Court certified two classes: (1) a Rule 23(b) (3) class, with opt out rights, of all public and private elementary and secondary schools and school districts in the United States, respecting claims for compensatory damages, and (2) a no-opt-out "mandatory" class under Rule 23(b)(1)(B) of the same schools and school districts respecting claims for punitive damages. It based certification of the mandatory class solely on its belief that there was a "substantial possibility that early awards of punitive damages in individual cases . . .

[would] . . . impair or impede the ability of the future claimants to obtain punitive damages." *In re Asbestos School Litigation,* 104 F.R.D. 422, 437 (E.D. Pa. 1984), A-77.* This belief stemmed from a legal theory espoused by petitioners of "limited generosity," namely that even without a limited fund of assets, the fund might be limited through court-imposed limitations on the right of class members to recover punitive damages from defendants because earlier recovering schools might have punished them enough by their punitive damage recoveries through separate litigation. Class certification under Rule 23(b)(2) for abatement, monitoring and medical surveillance claims was denied on the ground that the relief sought was basically monetary, and not injunctive in nature.

Interlocutory appeals were taken from the order of the district court dated September 28, 1984 (Pretrial Order No. 20), A-52 containing all these class certification rulings. The Court of Appeals affirmed the certification of the (b)(3) compensatory damages class and the denial of the (b)(2) class, but vacated the certification of the punitive damages class under (b)(1)(B).

No issue of constitutional law, of federal law, or of the construction of Rule 23 was reached by the Third Circuit in any of its rulings. Instead, it vacated the certification of the (b)(1)(B) "mandatory" class on two purely factual grounds: first, it held that the district court's factual finding on the potential amount and scope of punitive damages was inadequate; 789 F.2d at 1005, A-28; second, it concluded that the class certified was under-inclusive of all existing and potentially affected property and personal injury asbestos claimants against defendants and that certification of a mandatory class would not and could not accomplish equality of treatment for all such claimants. The Third Circuit said that even if it were to remand the (b)(1)(B) certification for

* Refers to Appendix for Petition for Certiorari by Petitioners.

the development of a record on the possibility of there being a limited fund or other obstacle to all class members being afforded an equal opportunity to a punitive damages award, it was clear that other actions by other persons and entities not within the school board class who would be seeking punitive damages from the same potential fund would go forward in any event. The Court of Appeals reasoned that Rule 23(b)(1)(B) —

> exists to protect potential claimants and provide equality of treatment. Certification of a punitive damages class under the provision will not accomplish these objectives. In the court's pursuit of an end that is not attainable, the class designed to be protected will be burdened with hardships not imposed on any other litigants.
>
> 789 F.2d at 1006, A-29.

Thus the Third Circuit simply concluded that, under the unique circumstances of the massive asbestos litigation, when only a relatively small number of potential litigants would be included in the "mandatory" class, a class action under Rule 23(b)(1)(B) could not be sustained. The Court of Appeals clearly did not even reach, let alone decide, either the putative due process issue advanced by petitioners — whether the Constitution prohibits successive punishment of one defendant for one action that injures many victims, — or the issue whether the Anti-Injunction Act, 28 U.S.C. §2283, was violated by the certification of the "mandatory" (b)(1)(B) class. Given the factual bases for the Third Circuit's ruling on the (b)(1)(B) class, a decision on these issues clearly would have been hypothetical and, therefore, unnecessary. Accordingly, the Court below properly chose not to speak to these issues.

In addition, the Third Circuit refused to disturb the District Court's denial of class certification under Rule

23(b)(2) based on its discretionary finding that the instant school asbestos claimants are primarily seeking monetary relief. 789 F.2d at 1008, A-32-33. Thus, here again, the court never reached the question on which the petitioners ask this Court for an advisory opinion.

The affirmance of the (b)(3) class is not at issue in the present petition.

I. NO SPECIAL OR IMPORTANT REASON EXISTS FOR REVIEW BY THIS COURT OF THE THIRD CIRCUIT'S DECISION ON INTERLOCUTORY CLASS RULINGS, NOR IS THERE ANY CONFLICT AMONG CIRCUITS ARISING FROM PETITIONERS' HYPOTHETICAL QUESTIONS PRESENED FOR REVIEW.

A. THE QUESTION—WHETHER DUE PROCESS REQUIRES AN AGGREGATE LIMIT ON MULTIPLE PUNITIVE DAMAGES IN MASS TORT CASES—WAS NOT DECIDED BELOW, AND IN ANY EVENT PRESENTS NO CONFLICT AMONG THE CIRCUITS.

Petitioners argue that the Third Circuit's vacation of the Rule 23(b)(1)(B) class placed at issue the question whether there is any due process limit on the aggregate amount of punitive damages that may be awarded against a defendant in successive judgments arising from the same act or series of acts. This is so, they reason, because the (b)(1)(B) class protected their right to be free of unlimited punishment. In seeking certiorari, they request this Court to establish that (b)(1)(B) may be used to enforce such an aggregate limit and to rectify the putative conflict over the issue in the Courts of Appeals.

Petitioners' reasoning is flawed because no Court of Appeals, including the Third Circuit, has held that defendants have a due process right to an aggregate

limit on punitive damages.[1] Certainly this issue was not decided by the Third Circuit in its ruling in this case.

Petitioners' clever briefing cannot conceal the fact that the mandatory class certified by the district court in *this* case was "critically flawed" because of its vast under-inclusiveness. Nor can it conceal the fact that this under-inclusiveness and the lack of a factual record support or findings for the "limited generosity" theory were the sole bases for the Third Circuit's decision to vacate the certification of the (b)(1)(B) class. The Third Circuit's parenthetical dictum on the possible merits of a due process/punitive damages class under Rule 23(b)(1)(B) under different circumstances, played no role in its ruling. It follows that nothing in the Third Circuit's decision implicates either the Constitution, federal law, or the interpretation of Fed.R.Civ.P. 23.

This conclusion is made plain by the language of the Court itself:

> We conclude that the mandatory class cannot be approved because of a lack of necessary findings and

---

1. To the contrary, courts of appeals that have considered the question of a (b)(1)(B) class in the context of a mass tort suit all have made their inquiries from the point of view of the plaintiffs' rights, not the defendants'. This is so whether a court has considered the impact of a limited fund in terms of the plaintiff class' right to equal access to any punitive damage award, *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858, 861-62 (2d Cir.) *cert. denied* 104 S.Ct. 1417 (1984); the effect on a plaintiff class of state law-imposed restraints on repetitive punitive damages awards, *In re School Asbestos Litig.*, 789 F.2d 996, 1004 (3d Cir. 1986); or the necessity of a factual record demonstrating the risk that early-filing claimants to a limited fund will lessen the potential for recovery of those claimants who file later. *Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1985) *In re Northern District of Cal. Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied* 459 U.S. 1171 (1983). In these inquiries, *it is the rights of the plaintiff class that are at issue*. There is no conflict among the circuits on this point. The issue of defendants' rights to determination of an aggregate limit to punitive damages is an entirely different question and is totally hypothetical in this case.

> for the additional reason that the class, being underinclusive, cannot in the circumstances here accomplish the objectives for which it was created.
> 789 F.2d at 998, A-11

The Court explained its ruling specifically that:

> The district court made no factual findings at all as to the potential amount and scope of punitive damages. This is in sharp contrast to the detailed findings on the subject in *In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718 (E.D. N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 104 S.Ct. 1417 (1984).
>
> * * *
>
> Assuming that the record supported the "limited generosity" theory, we would nonetheless decertify the class on the ground that it is underinclusive.
> 789 F. 2d at 1005, A-25-26

Thus, two purely factual matters underlay the Third Circuit's ruling on the (b) (1) (B) class.

The Third Circuit's language stands out all the more clearly in view of its recognition that there might be arguments for the proposition that, as a matter of Constitutional law, the courts should shoulder some responsibility for preventing successive punitive damage awards for the same acts. 789 F.2d at 1005, A-25. Specifically the Court

> assumed[d] *without deciding*, that these arguments might provide a threshold for the exercise of discretion in certifying a nationwide (mandatory) Rule 23(b) (1) (B) class for punitive damages. *We nonetheless hold that the district court abused its discretion* in certifying the 23(b) (1) (B) class here because neither the record nor the court's findings are adequate to support the procedure. (Emphasis added)

Clearly, the court below chose not to decide any constitutional or federal law questions at this stage of the litigation, nor to interpret Rule 23 in any way other than to observe its basic objectives, about which there is no dispute. Having made its wishes vividly clear, there is now no issue for review by this Court.

Nor is there any basis to argue that the Third Circuit's ruling conflicts with any other Circuits on these points. On the contrary, the court below expressly held open the possibility of a (b) (1) (B) punitive damages class in more appropriate circumstances, 789 F.2d at 1008, A-32, citing *In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984) and *In re Northern District of California Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

B. THE PROPER STANDARD TO SUPPORT A RULE 23(b) (1) (B) CLASS CERTIFICATION FOR PUNITIVE DAMAGE CLAIMS WAS NOT DECIDED BELOW, AND, IN ANY EVENT, PRESENTS NO CONFLICT AMONG THE CIRCUITS.

Petitioners argue that the Third Circuit erroneously vacated the (b) (1) (B) "mandatory" class for punitive damages and that its ruling perpetuates confusion among the Circuits concerning the proper standard to support a (b) (1) (B) class in the context of mass tort suits. They seek review by this Court to resolve that perceived confusion by "establishing that Rule 23(b) (1) (B) can be used to protect due process rights when hundreds of plaintiffs seek punitive damages for the same act or series of acts and thereby provide equal access to all claimants to any awards of punitive damages." Petition for Certiorari, 17-18.

Petitioners' boldness in seeking an advisory opinion on this issue that was never decided below, serves only to delay the proceedings and unduly burden the parties

and this Court. As demonstrated, the Third Circuit's decision was based entirely on factual considerations.

Because the Third Circuit, did not rule on the proper standard to support a (b) (1) (B) class for punitive damages, the decision below is not in conflict with any other Court of Appeals.[2] If anything, its approving references to the rulings of those other Circuits, *In re Bendectin, Dalkon Shield, supra,* holding open the possibility of a Rule 23(b) (1) (B) class for punitive damages "in more appropriate circumstances" negate the existence of any conflict.

C. THE QUESTION, — WHETHER A DISTRICT COURT EVER MAY CERTIFY A NATIONWIDE RULE 23(b) (1) (B) CLASS FOR PUNITIVE DAMAGES — CANNOT BE IN CONFLICT WITH OTHER CIRCUITS BECAUSE THE THIRD CIRCUIT LEFT OPEN THIS QUESTION, AS DID THOSE COURTS.

The decision below compared the relatively modest elementary and secondary school class in this litigation to the universe of potential punitive damage claimants against the asbestos companies. In vacating the Rule 23(b) (1) (B) school class for punitive damages the Third Circuit noted that. . . " . . ."Rule 23(b) (1) (B) exists to protect potential claimants and provide equality of treatment" whereas the effect of certification in this case of

2. Petitioners attempt to demonstrate a disparity between the various Circuits' interpretation of Rule 23(b) (1) (B) with respect to the standard necessary to invoke that provision, and that the Third Circuit's decision somehow was engendered "confusion" on this point. Petition at 17. However, the Third Circuit's decision did not discuss the question of the proper standard under this provision; it referred to the absence of any factual findings to which *any* standard could be applied. *See* 789 F.2d at 1005. Thus, this case does not raise the issue of the proper standard to be applied under Rule 23(b) (1) (B).

an under-inclusive "mandatory" class "has been to single out the school districts for special and possibly disadvantageous treatment." 789 F.2d at 1006, A-29.

The Court of Appeals did not decide any constitutional or statutory limitations on the use of a nationwide class for mass tort litigation under Rule 23(b) (1) (B). On the contrary, the court recognized: "Whether a national class based on a constitutional challenge could accomplish that result [of overcoming the problem of under-inclusiveness of the class] is obviously not before us." 789 F.2d at 1006, A-29-30. The court expressly left open the question whether an under-inclusive class ever can be properly certified under Rule 23(b) (1) (B) under different circumstances, and the court did not address the issue whether a nationwide Rule 23(b) (1) (B) class for punitive damages ever may be certified:

> We do not hold that under-inclusiveness is necessarily fatal to a class created under 23(b) (1) (B);[10] rather, each case requires a careful assessment of the factors mentioned in Rule 19. Courts should give particular attention to the possibility of prejudice either to those omitted from the class or to those within it. In the circumstances here, we conclude that under-inclusiveness does pose such an obstacle.
>
> [Footnote]
>
> 10. We obviously do not reach the question whether the notion of under-inclusiveness applies outside of a 23(b) (1) (B) mandatory class action.
>
> 789 F.2d at 1007, A-30

Under these circumstances, the question whether constitutional or statutory limitations prohibit the certification of a Rule 23(b) (1) (B) nationwide class for punitive damages is purely hypothetical in this case, and raises no issue or special reason for review by this Court or any conflict among the circuits.

D. THE QUESTION — WHETHER CLASS CERTIFICATION FOR A DECLARATORY JUDGMENT LIMITED TO SELECTED COMMON QUESTIONS IN MASS TORT PRODUCT LIABILITY LITIGATION IS PROPER UNDER RULES 23(b) (2) and (c) (4) (A) — WAS NOT DECIDED BELOW AND PRESENTS NO CONFLICT AMONG THE CIRCUITS.

The Third Circuit affirmed the District Court's denial of a school asbestos class under Rule 23(b) (2). After reciting the procedural background of this ruling, the Third Circuit affirmed that denial in two brief paragraphs:

> Precedent supports the district court's view that an action for money damages may not be maintained as a 23(b) (2) class action. (citations omitted) We see no justification for overturning the district judge's evaluation of the realities of the litigation before him. Counsel's desire to have a mandatory class is understandable, but the case for such a certification has not been established.
>
> We find neither error of law nor abuse of discretion in the judge's ruling, and consequently will affirm the denial of a (b) (2) class.
>
> 789 F.2d at 1008, A-33

Because the Circuit Court held that this case did not fall within Rule(b) (2), it never reached the question of certifying selected common issues or whether there were common issues that might be suitable for 23(b) (2) class treatment. In light of the Third Circuit's summary ruling that 23(b) (2) is inapplicable, Petitioners' question presented for review by this Court — whether class certification for declaratory judgment limited to selected common questions in mass tort product liability is proper under Rule 23(b) (2) and (c) (4) (A) — is purely hypothetical and does not raise any issue in conflict with other circuits.

II. THE THIRD CIRCUIT'S OPINION ON INTERLOCUTORY AND CONDITIONAL CLASS CERTIFICATION RULINGS MAKES ANY SUPREME COURT REVIEW ENTIRELY PREMATURE AT THIS TIME, PARTICULARLY WHEN, AS HERE, THE FIRST PUNITIVE DAMAGE AWARD TO ANY SCHOOL DISTRICT AGAINST ANY DEFENDANT HAS YET TO BE MADE.

Even if the Third Circuit had chosen to express its views on the due process rights of petitioners, any Supreme Court review of that ruling would have been entirely premature. As this Court has held, it does not decide abstract, hypothetical or contingent questions, or constitutional questions before they need be decided. *Thorpe v. Housing Authority of City of Durham, N.C.*, 383 U.S. 268, 284, 89 S.Ct. 518, 527, 21 L.Ed.2d 474 (1969) *quoting Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461, 65 S.Ct. 1384, 1389, 89 L.Ed. 1725 (1945); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897 (1955) (Supreme Court "does not sit to satisfy a scholarly interest" in "intellectually interesting and solid problems," nor "for the benefit of the particular litigants. . . Special and important reasons' imply a reach to a problem beyond the academic or the episodic."). Yet, that is precisely what petitioners seek from this Court. Plainly, the Third Circuit's opinion, rendered prior to final judgment, addressed the district court's class rulings which by virtue of Rule 23(c) (1), are themselves interlocutory and conditional.[3] At any time prior to a decision on the merits, the district court may alter or amend its

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3. Trial Court decisions on class certifications are "inherently tentative." *See, Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978); *Moses S. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, n. 14, 103 S.Ct. 927, 935 n. 14, 74 L.Ed.2d 765 (1983)

class rulings.[4]

In addition to the interlocutory and conditional nature of the rulings involved, review certainly would be premature when, as here, the first punitive damage award to any school district against any defendant herein has yet to be made. Thus, not only is the claimed due process right not to be burdened with successive punitive damages awards arising out of the same action a hypothetical right not ruled upon by the Third Circuit, conditionally or otherwise, but no defendant actually has been threatened by the loss of such an asserted right in any school asbestos case to date.[5] In light of the purely speculative nature of petitioners' contention, no review by this Court is now necessary.

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4. See, Wright, Miller & Kane, *Federal Practice & Procedure*, Civil 2d §1785. (1986); 2 H. Newberg, *Newberg On Class Actions*, §§7.33, 7.47 (2d Ed. 1985)

5. Last term, this Court denied certiorari in two fully matured cases which held that successive awards of punitive damages in asbestos personal injury cases arising from one act of defendant do not violate due process. *See, Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1570 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 3335 (1986) (trial court's review of jury verdict satisfies due process; punitive damages "overkill" is not "basis for denying otherwise proper punitive damages recovery", *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) (*en banc*), *cert . denied*, 106 S.Ct. 3339 (1986); Accord: *Martin v. Johns-Manville Sales Corp.*, 508 Pa. 154, 494 A.2d 1088, 1099 (Pa. 1985) (requirement that punitive damages award bear some reasonable relationship to compensatory damages awarded protects defendants); *Lemer v. Boise Cascade, Inc.*, 107 Cal.App.3d 1, 165 Cal.Rptr. 555 (Cal.App. 1980) (award of punitive damages to one plaintiff no bar to later award of punitive damages to another plaintiff for the same act of defendant); *State ex rel. Young v. Crookham*, 290 Ore. 61, 618 P.2d 268 (Ore. 1980) (court rejected "one bite/first comer" approach to punitive damages).

CONCLUSION

None of Petitioners' Questions Presented for Review in their Petition for Certiorari was addressed by the Third Circuit's opinion in this case. They are all hypothetical, reflecting petitioners' desire to maintain a "mandatory" nationwide class in these school asbestos property damage cases. But this Court wisely does not issue advisory opinions on issues not decided below, and the Petition for Certiorari by National Gypsum Company et al. should be summarily denied.

Respectfully submitted,

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No. 86-339 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NATIONAL GYPSUM COMPANY,
UNITED STATES GYPSUM COMPANY, and
W. R. GRACE & CO.,
Petitioners

v.

SCHOOL DISTRICT OF LANCASTER, *et al.*,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners

v.

SCHOOL DISTRICT OF LANCASTER, *et al.*,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTRODUCTION

Respondent-class representatives School District of Lancaster, Manheim Township School District, Lampeter-Strasburg School District, Board of Education of the Memphis City Schools and Napa Valley Unified School District ("Lancaster representatives"), five of the six representatives for the nationwide class certified by the District Court below, file this brief in response to the petition for certiorari to the United States Court of Appeals for the Third Circuit to review that portion of its judgment in *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), *reh'g denied* (June 2, 1986), vacating the certification of a mandatory class under Fed.R.Civ.P. 23 (b)(1)(B) and upholding the denial of certification of a mandatory class under Fed.R.Civ.P. 23(b)(2). This petition

was filed by only three of some 50 defendants in this litigation. For the reasons discussed below, the Lancaster representatives respectfully submit that the Court should deny the petition for certiorari in all respects.[1]

In the District Court proceedings below, the Lancaster representatives argued in support of the certification of mandatory classes under Rule 23(b)(1)(B) and Rule 23(b)(2), in addition to a voluntary class under Rule 23(b)(3). Specifically, they argued in favor of a Rule 23(b)(2) class for equitable relief, including mandatory injunctive relief to perform asbestos abatement action and restitutionary relief as an alternative to compensatory damages, and in support of a mandatory Rule 23(b)(1)(B) "limited fund" class for all damages. The Lancaster representatives also argued in the District Court in support of a mandatory (b)(1)(B) class for punitive damages.

After the District Court certified a 23(b)(3) compensatory damages class and a (b)(1)(B) class for punitive damages, but denied a (b)(2) class, the Lancaster representatives supported the District Court's class certification order in all respects. Thus, on appeal to the Third Circuit, they supported only the 23(b)(3) class and the 23(b)(1)(B) class.

Following extensive briefing and oral argument on all class certification issues, the Third Circuit affirmed the District Court's certification of the 23(b)(3) class and its denial of the 23(b)(2) class, but vacated the 23(b)(1)(B) class certification. For the reasons discussed below, the Lancaster representatives believe that there is no legal basis for a review by the Supreme Court of the Third Circuit's decision and that practical considerations also weigh strongly against such a review.

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[1] On August 29, 1986, all six class representatives, including Barnwell School District No. 45, joined in a brief in opposition to a petition for writ of certiorari to the Third Circuit Court of Appeals to review that portion of its judgment in the same decision *affirming* a Rule 23(b)(3) voluntary class, which petition was filed by nine other defendants in this litigation. From the very incipiency of the litigation, all class representatives have been in agreement in favor of a Rule 23(b)(3) class; they only have differed with respect to the appropriateness of a mandatory class under Rule 23(b)(1)(B) or Rule 23(b)(2).

REASONS FOR NOT GRANTING THE WRIT

All of the class representatives are in agreement that the Rule 23(b)(3) class affirmed by the Third Circuit should proceed and should not be reviewed by this Court, *inter alia*, because no special or important reason for the exercise of the Court's discretion as required under S.Ct. Rule 17.1, expressing the considerations governing review on certiorari, exists at this juncture. For the same reason, all of the class representatives are now united in urging the denial of review of the Third Circuit's determinations on mandatory class issues under Rule 23(b)(1)(B) and Rule 23(b)(2).

The decision of the Third Circuit does not warrant review by the Court. The Third Circuit's decision, effectuating a denial of mandatory class treatment in the asbestos property damage area, does not conflict with any decision of another circuit or of any state court of last resort. *Cf. Jenkins v. Raymark Industries, Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985) (certifying asbestos personal injury class under Rule 23(b)(3) but denying mandatory class treatment under Rule 23(b)(1)(B)), *affirmed*, 782 F.2d 468 (5th Cir.), *reh'g denied*, 785 F.2d 1034 (1986). Nor is there any other consideration justifying review.

Finally, there are practical considerations supporting a denial of certiorari in all respects. Whatever the perceived benefits, whether theoretical or practical, of a mandatory class in *this* litigation, the class certification proceedings alone in this case have already been unduly protracted. The District Court's interlocutory class certification decision was issued on September 28, 1984.[2] The Third Circuit's decision has now resulted in the unification of all the class representatives, and their counsel, and they are proceeding with the litigation in a united and cooperative manner to resolve it. Accordingly, the Lancaster representatives submit that the Court should not allow a further delay of this already protracted litigation by granting the review requested by a few of the many defendants herein, and should instead permit it to proceed on the merits, so as to facilitate its ultimate resolution.

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[2] However, the plaintiffs' motion for class certification was filed over half a year before that date, on March 9, 1984.

CONCLUSION

For all of the above reasons, the Court should deny the request for a writ of certiorari to the Third Circuit Court of Appeals.

Respectfully submitted,

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No. 86-339

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

NATIONAL GYPSUM COMPANY, UNITED STATES GYPSUM COMPANY, AND W.R. GRACE & CO.,

Petitioners,

v.

SCHOOL DISTRICT OF LANCASTER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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RULE 28.1 STATEMENTS

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents make the following statements disclosing parents, non-wholly owned subsidiaries and affiliates:

The Celotex Corporation:
Jim Walter Corporation and Carey Canada Inc.

Carey Canada Inc.:
Jim Walter Corporation and The Celotex Corporation.

GAF Corporation:
None.

Asbestos Corporation, Ltd.:
None.

Bell Asbestos Mines, Ltd.:
None.

Owens-Corning Fiberglas Corporation:
Arabian Fiber Glass Insulation Company (indirectly owned); Norsk Glassfiber A/S (indirectly owned); Oregon Metallurgical Corporation; Verac Technology A/S.

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INTRODUCTION

This Brief in Opposition is submitted in response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit ("Petition"), which was filed by defendants National Gypsum Company, United States Gypsum Company and W.R. Grace & Co. ("Petitioners") on August 30, 1986. The Petition asks this Court to review those portions of the judgment of the United States Court of Appeals for the Third Circuit in *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), which vacated the District Court's Rule 23(b)(1)(B) certification of a nationwide mandatory class of public and private schools ("school districts") for the litigation of punitive damage claims and which affirmed the District Court's denial of Rule 23(b)(2) class certification.

The instant Petition is the second of two Petitions for Writ of Certiorari which ask this Court to review portions of the Third Circuit's judgment. On July 30, 1986, Respondents filed a Petition for Writ of Certiorari at No. 86-140 ("Respondents' Petition") seeking review of the Third Circuit's judgment insofar as it affirmed the District Court's Rule 23(b)(3) certification of a nationwide class for the litigation of the school districts' thousands of compensatory damage claims.

Respondents submit that the instant Petition should be denied. As Respondents' Petition demonstrates, the multitude of individual factual and legal questions that would have to be decided under the varying products liability laws of every jurisdiction in the nation make *any* type of class litigation — mandatory or otherwise — inappropriate in these actions. For this reason, those portions of the Third Circuit's judgment which Petitioners seek to reverse were correctly decided. Moreover, while Respondents entirely agree that decisive action is needed to combat the problems of arbitrary, capricious, multiple and runaway punitive damage awards, the mandatory class "solutions" proposed by Petitioners, like the lower courts' Rule 23(b)(3) decisions, are unworkable, inconsistent with the standards of Rule 23, and, if permitted by this Court, could impair established principles of constitutional law. Since the Third Circuit's Rule 23(b)(1)(B) and

Rule 23(b)(2) decisions accomplish the proper result by precluding class treatment, these decisions do not require Supreme Court review and should be left in place.[1]

While the Petition presents four discrete questions for Supreme Court review, basically two issues are involved: (a) the problems posed by multiple claims for punitive damages in nationwide litigation and (b) the propriety of "binding resolution" of particular issues by declaratory judgments when the primary relief sought is money damages. This Brief in Opposition will address the latter issue first.

ARGUMENT

I. THE THIRD CIRCUIT'S RULE 23(b)(2) DECISION DOES NOT MERIT SUPREME COURT REVIEW BECAUSE BINDING RESOLUTION OF PARTICULAR ISSUES BY DECLARATORY JUDGMENTS IS INAPPROPRIATE IN THIS LITIGATION

Petitioners seek review of the Third Circuit's Rule 23(b)(2) decision in order to "establish the propriety of [using the Rule 23(b)(2) mandatory class] procedure" in multi-plaintiff products liability cases like the present actions for the "issuance of declaratory judgments binding on all school districts and all defendants" to resolve certain alleged common questions pursuant to Rule 23(c)(4)(A). Petition at 21.[2] The Petition asserts, for example, that "a declaratory judgment determining whether asbestos-containing products in schools pose a hazard will not only resolve the liability of defendants but also give the nation's school districts standards concerning the need for abatement." Petition at 26.

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1. Should the Court grant the instant Petition, however, Respondents request that it do so for the purpose of affirming the Third Circuit's Rule 23(b)(1)(B) and Rule 23(b)(2) decisions solely on the grounds set forth herein.

2. Rule 23(c)(4)(A) provides that, "[w]hen appropriate[,] . . . an action may be brought or maintained as a class action with respect to particular issues. . . ." Respondents do not dispute the lower courts' ability, in a proper case, to isolate certain issues for class treatment under Rule 23(c)(4)(A). The Petition, however, completely fails to take into account the other requirements of Rule 23 that serve to limit the situations in which such a procedure is "appropriate."

Petitioners argue that "[t]he Third Circuit's denial of mandatory class certification has erroneously deprived petitioners of a cost-efficient single adjudication of their liability for the sale of asbestos-containing products for use in school buildings," and they urge this Court to "establish that a mandatory class action should be used to decide the common factual issues, including punitive damages claims, in mass product liability litigation." Petition at 8, 11.

Petitioners have taken the same approach to the question of class certification in these actions that class plaintiffs take in their Brief in Opposition to Respondents' Petition. Faced with overwhelmingly adverse precedent against class certification of similar products liability and toxic tort claims because of the numerous individual factual and legal questions involved, Petitioners emphasize the purported cost efficiencies of class litigation without regard to whether class certification (mandatory or otherwise) in these actions is permissible under the law. For the reasons which follow, mandatory class certification is not permissible in these actions.

Petitioners' Rule 23(b)(2) arguments do not satisfy the standards for granting review by writ of certiorari that are set out in Rule 17.1 of the Rules of the Supreme Court of the United States. Petitioners do not (and cannot) claim that there is any conflict among the federal circuits on the use of Rule 23(b)(2) or that there has been any departure from the usual and accepted course of judicial proceedings. To the contrary, Petitioners themselves are admittedly asking this Court to approve a radical departure from the usual and accepted application of Rule 23(b)(2). *See* Petition at 26-27. Finally, Petitioners' Rule 23(b)(2) arguments do not raise important questions of federal law because Rule 23(b)(2) was not intended to provide for the binding resolution of particular issues in actions, such as these, in which the primary relief sought is money damages and not injunctive or declaratory relief with respect to the class as a whole.

A. Petitioners' Proposed Mandatory Class Procedure Is Not Appropriate Because Common Questions Do Not Exist In These Actions

The Petition repeatedly alleges the existence of various common questions in these actions which were not identified as such by the courts below and which, upon close analysis, do not present common factual or legal questions at all. For example, the Petition asserts, at 21, that multi-plaintiff products liability cases "inevitably present a core of common questions on such issues as negligence, unreasonable danger, state-of-the-art, and the justifiability and amount of punitive damages."

The specific issues that the Petition identifies, *i.e.*, (1) the risk associated with the level of asbestos fibers normally found in the air in school buildings, (2) the state-of-the-art defense, and (3) the statute of limitations defense, *see* Petition at 5 n.4, are not susceptible to litigation on a common basis. The question of what level of asbestos exposure poses an unreasonable health risk, while of great importance to both plaintiffs and defendants, cannot be adjudicated in a vacuum in our legal system. Similarly, the question of what the defendants and the school districts knew or should have known will vary from school district to school district depending upon which finished product is involved and when (over a thirty year period) it was sold or installed.

As Respondents' Petition demonstrates, the courts below erred in their application of the legal standards of Rule 23 in permitting these actions to proceed under Rule 23(b)(3). That erroneous common question analysis — which also forms the basis of Petitioners' Rule 23(b)(2) argument — makes any type of class certification inappropriate in these actions.

B. Petitioners' Proposed Mandatory Class Procedure Is Not Appropriate Because The Requirements Of Rule 23(b)(2) Are Not Satisfied

Rule 23(b)(2) of the Federal Rules of Civil Procedure provides that an action may be certified for class treatment where, in addition to satisfying the requirements of Rule 23(a), the proponent of class certification establishes that:

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

It is well-established that "subdivision [(b)(2)] does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages." Supplementary Note of Advisory Committee Regarding 1966 Amendments to Rule 23. In denying Rule 23(b)(2) certification, the District Court stated, "Despite the ingenuity of plaintiffs' claims for equitable remedies, this case remains at bottom, one for legal damages." *In re Asbestos School Litigation*, 104 F.R.D. 422, 438 (E.D. Pa. 1984).[3] The Third Circuit held that this determination was a correct application of Rule 23(b)(2) to class plaintiffs' claims and affirmed the District Court's Rule 23(b)(2) decision as neither an error of law nor an abuse of discretion. The Third Circuit stated:

> Precedent supports the district court's view that an action for money damages may not be maintained as a Rule 23(b)(2) class action. *See, e.g., Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594 (4th Cir. 1976); *In re Arthur Treacher's Franchise Litigation*, 93 F.R.D. 590, 594 (E.D. Pa. 1982). We see no justification for overturning the district judge's evaluation of the realities of the litigation before him. Counsel's desire to have a mandatory class is understandable, but the case for such a certification has not been established.

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3. Class plaintiffs argued to the District Court that their claims warranted Rule 23(b)(2) certification because they were seeking injunctive remedies. They suggested that the test to be applied is whether the action is one "traditionally considered equitable in nature" and asserted that they were seeking four varieties of "equitable" relief: three forms of "mandatory injunctive relief" (future abatement action and two types of "monitoring services") and "equitable restitution." *See Asbestos School Litigation*, *supra*, 104 F.R.D. at 438. Class plaintiffs, however, did *not* appeal the District Court's denial of Rule 23(b)(2) certification to the Third Circuit and have never challenged the District Court's characterization of their claims under Rule 23(b)(2). Indeed, Petitioners themselves concede that "the primary relief claimed by class members is monetary damages." Petition at i.

School Asbestos Litigation, *supra*, 789 F.2d at 1008.[4]

The Third Circuit's Rule 23(b)(2) decision does not merit Supreme Court review because the courts below correctly ruled that class plaintiffs' claims are not "equitable" claims. In particular, the District Court correctly held that what class plaintiffs labeled as "equitable restitution" is in essence a claim for damages, not restitution.[5] Moreover, class plaintiffs' request for the payment of future remedial expenses is not sufficiently equitable in nature to bring it within Rule 23(b)(2). "A plaintiff cannot transform a claim for damages into an equitable action simply by asking for an injunction that orders the payment of money." *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir. 1979).[6]

Although class plaintiffs sought Rule 23(b)(2) certification in the District Court on the basis that they were seeking injunctive relief, Petitioners argue that Rule 23(b)(2) certification would be

4. In other products liability cases when injunctive relief was requested, courts have found class certification inappropriate under Rule 23(b)(2) because the relief requested related primarily to money damages. In *Payton v. Abbott Labs*, 83 F.R.D. 382, 389 n. 3, (D. Mass. 1979), *vacated on other grounds*, 100 F.R.D. 336 (D. Mass. 1983), for example, class certification was denied under Rule 23(b)(2), even though an injunction was sought ordering defendants to notify interested parties about DES, establish free clinics, stop "mass-marketing testing," and establish an insurance fund, because the predominant relief sought was money damages.

5. The equitable remedy of restitution looks to what a defendant has unjustly gained or received while the legal remedy of damages looks to what a plaintiff has unjustly lost. As one commentator has stated:

> [W]hat is common in [restitution] cases is that the defendant is liable for the gains he has made in the transaction, or what is now called his unjust enrichment. The restitution claim stands in flat contrast to the damages action in this respect. *The damages recovery is to compensate the plaintiff, and it pays him, theoretically, for his losses. The restitution claim on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep.*

Dobbs, *Remedies*, §4.1 at 224 (1973) (emphasis added) (footnote omitted).

6. In *Jaffee*, the Third Circuit rejected the notion that the relief sought was equitable because plaintiff requested "a traditional form of damages in tort — compensation for medical expenses to be incurred in the future . . . ," and because "the payment of money would fully satisfy Jaffee's 'equitable' claim. . . ." *Accord*, *In re Three Mile Island Litigation*, 87 F.R.D. 433, 442 (M.D. Pa. 1980).

proper because *declaratory relief*, a completely different type of remedy than that sought by class plaintiffs in the District Court, is appropriate for class treatment under Rule 23(b)(2). *See* Petition at 21-26.[7]

In focusing on the type of remedy they seek, Petitioners ignore, as did class plaintiffs before the District Court, the other requirements of Rule 23(b)(2). As explained in the Supplementary Note of the Advisory Committee Regarding 1966 Amendments to Rule 23(b)(2), "subdivision [(b)(2)] is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate."

First, the issuance of declaratory judgments on Petitioners' alleged common questions would not "settle the legality" of any conduct "with respect to the class as a whole." As discussed above, the numerous individual questions to be decided in "settling the legality" of the defendants' conduct make such a task impossible. Indeed, even if Petitioners' proposed mandatory class procedure were permissible, the remaining unresolved issues that would have to be decided on an individual basis before any liability determination could be made render Petitioners' proposed procedure unworkable.[8]

---

7. None of the Complaints in these actions seeks declaratory relief of the kind discussed in the Petition. There is thus no basis in the pleadings for Petitioners' argument that the District Court should have certified a mandatory class under Rule 23(b)(2) to resolve Petitioners' allegedly common issues on a declaratory basis under Rule 23(c)(4)(A).

8. The references in the Petition, at 21-22 and nn.23-25, to a number of instances in which courts have permitted a single trial of numerous plaintiffs' toxic tort claims are irrelevant to the present litigation. In each of these cases, all plaintiffs in the consolidated actions were before the court and each had the burden of proving his/her own claim. No plaintiff was attempting to prove another plaintiff's claim by virtue of the proof of his/her own claim, as representative plaintiffs must do. The flaw in Petitioners' analogy to the procedure of consolidating claims is thus, in their own words, the suggestion that "[t]his approach . . . be taken a step further" and applied to representative litigation under Rule 23. *See* Petition at 23.

Second, The Petition completely ignores Rule 23(b)(2)'s requirement that the party opposing the class have taken action or have refused to take action with respect to the class as a whole. The only circumstances in which the defendants have refused to act on grounds generally applicable to the class is their refusal to perform or pay for abatement work that class plaintiffs contend is necessary. This refusal cannot be sufficient under Rule 23(b)(2). If an action could be certified as a class action under subdivision (b)(2) simply because the defendants had refused to provide plaintiffs with the remedy they sought, every purported class action — especially class actions seeking money damages — would satisfy Rule 23(b)(2).

Finally, Petitioners' reliance on Rule 23(c)(4)(A) in order to support the certification of a mandatory Rule 23(b)(2) class is misplaced. Rule 23(b)(2) is only applicable when final injunctive relief or *corresponding declaratory relief with respect to the class as a whole* is appropriate. This standard plainly applies only to declaratory relief that *corresponds* to final injunctive relief. In this regard, the Supplementary Note of the Advisory Committee Regarding 1966 Amendments to Rule 23(b)(2) states that "[d]eclaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief." As Professors Wright and Miller explain:

> *[T]he declaration should be equivalent to an injunction.* . . . A request for a declaration that a particular patent is invalid or that a statute is unconstitutional would qualify as "corresponding declaratory relief" because the resulting judicial directive would have the effect of "enjoining" the enforcement of the patent or the statute. On the other hand, an action seeking a declaration that certain conduct constitutes a breach of contract would not qualify under Rule 23(b)(2) because the effect simply is to lay the basis for a damage award rather than injunctive relief.

7A Wright & Miller, *Federal Practice and Procedure*, §1775 at 22 (1972) (emphasis added). Petitioners are not seeking declaratory relief; they simply want the District Court to make certain findings of fact.

Accordingly, because the approach requested by Petitioners is unworkable, improper under Rule 23(b)(2) and inappropriate to these actions, it was neither an abuse of discretion nor an error of law for the District Court to decline to follow it. The Third Circuit's affirmance of that Rule 23(b)(2) decision was correct and does not merit Supreme Court review.

C. Petitioners' Proposed Mandatory Class Procedure Raises Constitutional Difficulties

Petitioners' Rule 23(b)(2) argument, if adopted, would eviscerate Rule 23(b)(3) by permitting any defendant in any class action — whether mandatory or opt-out — to assert that it wanted declaratory relief as to all class members, with no provision for opt-outs, in order to resolve certain issues of its choosing.[9]

This attempt to obtain a "binding resolution" of individual damage claims in a nationwide diversity action raises a serious due process problem of involuntary joinder of plaintiffs in a forum which lacks personal jurisdiction over them. This precise issue was noted in *Phillips Petroleum Co. v. Shutts*, 105 S.Ct. 2965, 2972-77 (1985). In *Shutts*, however, an opt-out provision obviated the problem. Here, by contrast, the entire thrust of Petitioners' Rule 23(b)(2) argument is that no opt-outs will be permitted.

Petitioners' proposed binding declaratory judgments are impermissible for the additional reason that their goal of having the United States District Court for the Eastern District of Pennsylvania, sitting in diversity, establish a nationwide exposure standard will cause the District Court to invade the provinces of

9. For example, a defendant in a Rule 23(b)(3) securities fraud action could request the court to certify a mandatory class on the questions of whether a prospectus contained any misrepresentations or omissions of fact and whether any such misrepresentations or omissions were material. Such a procedure purportedly would bind even those investors who had opted out of the Rule 23(b)(3) class. Likewise, a defendant in a products liability action could seek declaratory relief on the issue of whether its product was defective and purport to bind all purchasers of the product to that determination regardless of the individual circumstances surrounding the product's use by each purchaser.

Congress, the federal Environmental Protection Agency ("EPA") and the States in violation of the principles of federalism and the separation of powers. *See* Respondents' Petition at 12-14 and Reply Brief in Support of Respondents' Petition at 5-7.[10]

It is, however, unnecessary for the Court to reach these constitutional difficulties within the context of determining whether to grant review of the Third Circuit's Rule 23(b)(2) decision. Since the Third Circuit's affirmance of the District Court's denial of Rule 23(b)(2) certification simply followed the usual and accepted application of subdivision (b)(2), Supreme Court review is not warranted.

II. A MANDATORY CLASS ACTION PROCEDURE WILL NOT RESOLVE THE FUNDAMENTAL PROBLEMS RAISED BY MULTIPLE PUNITIVE DAMAGE CLAIMS

The basic thrust of Petitioners' Rule 23(b)(1)(B) argument is that mandatory class treatment of class plaintiffs' punitive damage claims is appropriate because of the likelihood that multiple punitive damage awards will violate the due process rights of the defendants. *See* Petition at 11-18. Petitioners' proposed procedural solution, however, merely addresses the symptoms of the problem without reaching the cause.

Should this Court grant review of the Third Circuit's Rule 23(b)(1)(B) decision vacating the certification of a mandatory punitive damage class, Respondents request that the Court do so for the purpose of affirming the Third Circuit's decision on the ground that, absent procedural safeguards, any award of punitive damages in these actions would violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.[11]

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10. In this regard, both the Senate and the House of Representatives have now passed the Asbestos Hazard Emergency Response Act of 1986, H.B. 5073 and S. 2083, and the EPA has issued an Advance Notice of Proposed Rulemaking on Asbestos-Containing Materials in Schools; Inspection, Notification, Management Plans, and Technical Assistance, 51 Fed.Reg. 28,914 (1986).

11. Respondents raise this issue in this Brief in Opposition rather than in a Cross-Petition because they do not seek any change in the Third Circuit's judgment vacating the District Court's Rule 23(b)(1)(B) class certification. *See*

This Court has often recognized that the Due Process Clauses protect against undue punishment in non-criminal contexts. *See, e.g., Allen v. Illinois*, 106 S.Ct. 2988 (1986); *Bell v. Wolfish*, 441 U.S. 520, 535-38 (1979). *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-69 (1963). It has also acknowledged that punitive damages are a deterrent, intended to punish a defendant rather than compensate a plaintiff. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979). Indeed, as the Third Circuit noted, punitive damage awards "act almost as a form of criminal penalty administered in a civil court at the request of a plaintiff who serves somewhat as a private attorney general." *School Asbestos Litigation*, *supra*, 789 F.2d at 1003.

Punitive damage awards, however, historically have been arbitrary, capricious and often completely unrelated to the type or extent of the injury that the plaintiff has suffered. For these reasons, various members of this Court have expressed concern regarding the largely uncontrolled ability of civil juries and courts to impose punitive awards on defendants with few, if any, procedural safeguards. In *Smith v. Wade*, 461 U.S. 30 (1983), for example, then Justice (now Chief Justice) Rehnquist, who was joined in dissent by Chief Justice Burger and Justice Powell, stated:

> [A]lthough punitive damages are "quasi-criminal," . . . their imposition is unaccompanied by the types of safeguards present in criminal proceedings. This absence of safeguards is exacerbated by the fact that punitive damages are frequently based upon the caprice and prejudice of jurors.

Id. at 59 (Rehnquist, J., dissenting). Similarly, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S.Ct. 2939

United States v. New York Telephone Co., 434 U.S. 159, 166 n.8 (1977). Moreover, this issue is "fairly included" within Petitioners' third question presented for review, *i.e.*, "May a district court properly certify a nationwide Rule 23(b)(1)(B) mandatory class for punitive damages?" Petition at i. *Cf.* Rule 21.1(a) of the Rules of the Supreme Court of the United States.

(1985), Justice Brennan, who was joined in dissent by Justices Marshall, Blackmun and Stevens, wrote that the Court's cases have

> recognize[d] that "the alleged deterrence achieved by the punitive damage awards is likely to be outweighed by the costs — such as the encouragement of unnecessary litigation and the chilling of desirable conduct — flowing from the rule, at least when the standards on which the awards are based are ill-defined."

Id. at 2956-57 n.4, *quoting Smith v. Wade*, *supra*, 461 U.S. at 59 (Rehnquist, J., dissenting). Likewise, in *Brotherhood of Electrical Workers v. Foust*, *supra*, Justice Marshall, who was joined by Justices Brennan, Stewart, White and Powell, stated:

> Because juries are accorded broad discretion as to the imposition and amount of punitive damages, . . . the impact of these windfall recoveries is unpredictable and potentially substantial.

442 U.S. at 50. Justice Marshall added that another danger of the unfettered discretion given to civil juries is that punitive damages "may be employed to punish unpopular defendants." *Id.*

Because of the above considerations, a number of jurisdictions prohibit the imposition of any punitive damage awards. *See, e.g., Killibrew v. Abbott Laboratories*, 359 So.2d 1275 (La. 1978); *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975); *Vratsenes v. New Hampshire Auto, Inc.*, 112 N.H. 71, 289 A.2d 66 (1972); *Kaki v. Aluminum Building Products*, 73 Wash.2d 23, 436 P.2d 186 (1968); *Pereira v. International Basic Economy Corp.*, 95 P.R.R. 28 (1967); *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N.E. 1 (1891).

In these diversity actions, the District Court is obliged under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to apply the substantive law of every jurisdiction in the country. *See* Respondents' Petition at 20-29. Because the punitive damage laws of the various jurisdictions not only vary but generally lack the type of procedural safeguards that are necessary to limit the power of the government to impose punishment on persons in

civil litigation, any award of such damages by the District Court in these actions would violate the defendants' due process rights. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va.L.Rev. 269 (1983)

In *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986), a case decided last Term, this Court noted but did not reach the issue of whether a punitive damage award offended due process. The petitioner in *Aetna* argued, *inter alia*, that the "lack of sufficient standards governing punitive damage awards in Alabama violates the Due Process Clause of the Fourteenth Amendment." *Id.* at 1589 This Court found it unnecessary to reach the due process question in *Aetna* but stated that it "raise[s] important issues which, in an appropriate setting, must be resolved." *Id.* This case could provide that setting.

Accordingly, Respondents request that, if the Court grants review of the Third Circuit's Rule 23(b)(1)(B) decision, it do so solely for the purpose of affirming that decision on the ground that, without procedural safeguards, any punitive damage award would violate the Due Process Clauses and that, for this reason, there is no basis for a mandatory punitive damage class in these actions.

CONCLUSION

For the reasons set forth herein, Respondents request that the Petition for Writ of Certiorari be denied. However, should this Court grant the Petition, Respondents urge affirmance of the Third Circuit's Rule 23(b)(1)(B) and Rule 23(b)(2) decisions on the grounds set forth above.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

NATIONAL GYPSUM COMPANY,
UNITED STATES GYPSUM COMPANY, AND
W.R. GRACE & CO.,
Petitioners,

v.

SCHOOL DISTRICT OF LANCASTER, *et al.*,
Respondents.

BRIEF OF FIBREBOARD CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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RULE 28.1 STATEMENT

Pursuant to Rule 28.1 of the Rules of the Supreme Court, respondent, Fibreboard Corporation, makes the following statement disclosing parents, non-wholly owned subsidiaries and affiliates:

Fibreboard Corporation:

Louisiana Pacific Corporation

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INTRODUCTION

Fibreboard Corporation ("Fibreboard") files this Brief in Opposition to the Petition of National Gypsum Company ("National Gypsum"), United States Gypsum Company ("US Gypsum") and W.R. Grace and Co. ("Grace") for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit. These three petitioners seek review of those portions of the Court of Appeals' judgment in *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), *reh'g denied* (June 2, 1986), which vacated certification of a mandatory class under Fed. R. Civ. P. 23(b)(1)(B) for punitive damages and which affirmed denial of class certification under Fed. R. Civ. P. 23(b)(2).

In this case, plaintiffs seek certification of a nationwide class of all elementary and secondary schools to recover the costs of inspecting, testing and abating myriad asbestos-containing products in school buildings across the country. Plaintiffs have sued over 50 defendants which had varying roles in the mining, manufacturing, distribution and installation of numerous different asbestos-containing products. Plaintiffs' claims do not relate to any single product or incident, but rather involve many distinct products used for a wide range of purposes at different times in different locations over a time span of more than thirty years.

Plaintiffs' claims are based upon alleged state law causes of action for negligence, strict liability, intentional tort, breach of warranty, concert of action and civil conspiracy. Resolution of plaintiffs' claims will require the determination and application of the different laws of over 50 jurisdictions which separately govern liability for defective products under the different causes of action in each separate jurisdiction.

On September 28, 1984, the District Court certified a voluntary class for compensatory damages under Fed. R. Civ. P. 23(b)(3) and a mandatory class for punitive

damages under Fed. R. Civ. P. 23(b)(1)(B). *In re Asbestos School Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984). The District Court denied class certification under Fed. R. Civ. P. 23(b)(2). On May 1, 1986, the Third Circuit Court of Appeals affirmed the District Court's certification of a class under Rule 23(b)(3) for compensatory damages and the denial of class certification under Rule 23(b)(2). The Court of Appeals vacated the District Court's certification of a class under Rule 23(b)(1)(B) for punitive damages.

On July 29, 1986, Celotex Corporation and others[1] filed a Petition for Writ of Certiorari seeking review of the Third Circuit's affirmance of the District Court's certification of a voluntary, nationwide class under Rule 23(b)(3) for compensatory damages.

National Gypsum, US Gypsum and Grace seek certiorari on grounds other than those articulated by Celotex. Fibreboard opposes the contentions that a nationwide class should be certified under Rule 23(b)(1)(B) or 23(b)(2) on the grounds that this case does not meet the minimum requirements for class certification under Rule 23. Should the Court grant both Petitions, it will be apparent that any class treatment is inappropriate in this particular case.

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1. Carey Canada, Inc., Fibreboard, GAF Corporation, Flintkote Company, Lac D'Amiante du Quebec, Ltee., Owens-Corning Fiberglas Corporation, Asbestos Corporation, Ltd. and Bell Asbestos Mines, Ltd. *See Celotex Corp. v. School District of Lancaster, petition for cert. filed*, 55 U.S.L.W. 3114 (U.S. July 29, 1986) (No. 86-140).

REASONS FOR DENYING THE WRIT

I. This Case Does Not Meet Rule 23 Requirements

Petitioners implicitly suggest that a nationwide mandatory class action should be certified in every mass products liability case, including the instant one, to avoid relitigation of allegedly common fact questions in courts across the country with resultant inconsistent judicial rulings and costly trials subjecting petitioners to repetitious and excessive punitive damages claims. What petitioners overlook is the unique nature of this particular case which forecloses its class treatment under any subsection of Rule 23.

A. Lack of Questions of Law or Fact Common to the Class and Lack of Typical Claims Required Under Rules 23(a)(2) and (a)(3)

Rule 23(a) contains minimum prerequisites which must be satisfied before an action may be maintained as a class action under Rule 23(b). Rule 23(a)(2) requires the presence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The three petitioners herein seek class certification as to punitive damages under Rules 23(b)(1)(B) and (b)(2). However, such certification is precluded because the minimum requirements of Rule 23(a)(2) have not been satisfied.

This Court stated in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982):

> Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and they "turn on questions of law applicable in the same manner to the class. . . ."

Id. at 155, *quoting Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

One commentator has included in the category of "[p]roblem areas for common questions. . ." those "actions in which liability is governed by state law provisions and the causes of action of class members accrued in different states." 1 H. Newberg, *Newberg on Class Actions* §3.11, at 160-161 (2d ed. 1985). This case fits within the "problem areas for common questions" because of its unique nature. This litigation involves very different products which were used for numerous purposes at various locations over many years. These products differed in composition, size, color, appearance, fiber content and degree of friability. The defendants performed distinct functions with respect to varied products at different times and in different locations across the country.

In view of the unique nature of this case, there are few, if any, of the significant common questions of fact required under Rule 23(a)(2). The issue of whether any particular defendant's conduct warrants the imposition of punitive damages will vary as to time, plaintiff and defendant. A particular defendant's awareness of the dangers of asbestos at any given time will be germane to each plaintiff's case and will vary over time from defendant to defendant and from product to product.[2] Related factual questions include each individual defendant's knowledge about the proposed use of varied products by each plaintiff and the relationships, if any, that existed between plaintiffs and defendants at any given time.[3]

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2. Illustrative of how evidence must be tailored to different time periods is the case of *City of Greenville v. W.R. Grace and Co.*, 55 U.S.L.W. 2039 (D.S.C. June 11, 1986) (No. 85-1693). In *City of Greenville*, one of the proofs offered by plaintiff was that Grace sold asbestos-free products for use in the Northeast, but continued to sell asbestos-containing products in parts of the South in the early 1970's. This evidence would, of course, not be relevant to claims that Grace sold asbestos-containing products in the South in the early 50's.

3. For example, in *Harrigan v. United States*, 63 F.R.D. 402 (E.D. Pa. 1974), a medical malpractice suit against the Veterans

Other fact questions which are not common and which may be relevant to punitive damage issues are the motives of each individual defendant, the extent of harm to each plaintiff, the wealth of each defendant and prior and potential awards in other cases. *Restatement (Second) of Torts* §908, comment e (1979).[4] Thus, the issue of punitive damages should be addressed on a case-by-case basis and class treatment is inappropos because of the lack of common factual issues required by Rule 23(a)(2).

There is a corresponding lack of common legal issues which prevents satisfaction of Rule 23(a)(2). Following *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and this Court's recent decision in *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965 (1985), the Third Circuit acknowledged that the varying laws of over 50 jurisdictions will eventually have to be applied to the claims in this case. *See School Asbestos Litigation, supra*, 789 F.2d at 1010. State substantive laws on punitive damages vary from jurisdiction to jurisdiction and raise very uncommon questions of law.

Standards for the assessment of punitive damages are very dissimilar. For example, although most jurisdictions permit awards of punitive damages in addition to compensatory damages, Connecticut, Georgia, Michigan and New Hampshire treat punitive damages as essentially compensatory in nature.[5] Indiana, Louisiana, Massachusetts and Washington either partially or totally prohibit punitive damage awards.[6] In certain states, pu-

Administration was denied class treatment because operations were performed by different doctors upon different patients in various states, a situation similar to the varying relationships existing between individual plaintiffs and defendants in the instant matter.

4. *See also* 1 J. Ghiardi and J. Kircher, *Punitive Damages Law and Practice* §6.09 at 31-39 (1981); 3 H. Newberg, *Newberg on Class Actions* §17.30, at 411 (2d ed. 1985).

5. *See* 1 J. Ghiardi and J. Kircher, *Punitive Damages Law and Practice* §§4.02-.06, at 2-8 (1981).

6. *Id.* §§4.07-13, at 8-12.

nitive damages are allowed by common law or by statute and are not permitted in some states if the defendant is subject to criminal prosecution.[7] In some states allowing punitive awards, there have been different legislative or judicial guidelines as to the type of conduct in which a defendant must have engaged to warrant assessment of punitive damages.[8] Some states do not require an award of compensatory damage to sustain an award of punitive damages, while others require that at least nominal compensatory damages must be awarded.[9] Some jurisdictions require a reasonable relationship between the amounts of compensatory and punitive damages awards, while others do not.[10]

Evidentiary standards relating to punitive damages also differ from jurisdiction to jurisdiction. Several states admit evidence of criminal sanctions against a defendant and a defendant's financial status to counter excessive punitive damage awards.[11] There is also substantial difference among the jurisdictions on whether punitive damages must be consistent with the underlying cause of action to be awarded or whether they must depend, not upon the nature of the underlying cause of action, but upon the nature of the individual defendant's conduct.[12] Disparate burden of proof standards also exist

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7. *Id.*, Table 4-1, at 26-30 (Supp. 1986).

8. *Compare Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 113 Cal. Rptr. 711, 521 P.2d 1103, 1110 (1974) *with Franklin Music v. American Broadcasting Co.*, 616 F.2d 528 (3d Cir. 1979) (applying Pennsylvania law) *and King v. Allstate Ins. Co.*, 272 S.C. 259, 251 S.E.2d 194, 196 (1979), *quoting Cox v. Coleman*, 189 S.C. 218, 200 S.E. 762, 764 (1939) *and Inland Container Corp. v. March*, 529 S.W.2d 43, 45 (Tenn. 1975).

9. *See* 1 J. Ghiardi and J. Kircher, *Punitive Damages Law and Practice* §5.37, at 108-10 (1981).

10. *Id.* §39, at 112-16.

11. *Id.*, Table 5-4, at 152-55; Table 5-5, at 144-47 (Supp. 1986).

12. *Id.* §§6.15-.18, at 54-70.

among the jurisdictions.[13] Differences exist on the issue of apportionment[14] and contribution.[15] Some states do not allow remittitur of excessive punitive awards.[16]

The foregoing brief survey underscores the disparity among state substantive law which raises very uncommon questions of law.[17] The District Court would be required to master the law on punitive damages in every

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13. Two states have statutes dealing specifically with punitive damage awards in product liability actions. Oregon requires proof "by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare of others." Or. Rev. Stat. §30.925 (1979). Connecticut requires only proof of "reckless disregard" by a product supplier "for the safety of product users, consumers, or other who were injured by the product." Conn. Gen. Stat. §52-240b. Other states have general punitive damage statutes held applicable to product liability cases. Minnesota has adopted a "clear and convincing" burden of proof standard, Minn. Stats. Ann. §549.02, while Colorado requires proof beyond a reasonable doubt. Col. Rev. Stat. §13-25-127(2). Other states having general punitive damage statutes applicable to product liability cases do not set forth specific burden of proof standards. *See* Cal. Civ. Code §32941 (West 1970); Ga. Code Ann. §105-2002 (1968); Nev. Rev. Stat. §42.010 (1979); N.D. Cent. Code §32-03-07 (1977); S.D. Comp. Laws Ann. §21-3-2 (1979).

14. *See* 1 J. Ghiardi and J. Kircher, *Punitive Damages Law and Practices* §§16.08-.10, at 10-17 (1981).

15. *Id.* §16.07, at 8-10.

16. *See, e.g., Firestone v. Crown Center Redevelopment Corp.*, 693 S.W. 2d 99, 110 (Mo. 1985); *State ex rel. Young v. Crookham*, 290 Or. 61, 618 P.2d 1268, 1272 (1980); *Team Central Inc. v. Teamco, Inc.*, 271 N.W. 2d 914, 926 (Iowa 1978); *Earl T. Browder, Inc. v. County Court of Webster County*, 145 W. Va. 696, 116 S.E. 2d 867, 8723 (1960); *Louisville and N.R. Co. v. Complete Auto Transit, Inc.*, 259 S.W. 2d 483, 484 (Ky. App. 1953).

17. The varying state substantive laws on punitive damages will further complicate manageability problems if a class for compensatory damages is certified under Rule 23(b)(3) and a mandatory class for punitive damages is certified under Rule 23(b)(1)(B) and (b)(2). *See Celotex Corp. v. School District of Lancaster, petition for cert. filed*, 55 U.S.L.W. 3114 (U.S. July 29, 1986) (No. 86-140), Part IV, at 20-29.

jurisdiction and then sort and apply the differing and unequal burdens of proof, standards and evidentiary guidelines applicable in each jurisdiction. The District Court will then have to decide whether each plaintiff sustained its individual burden of proof against individual defendants based upon the specific circumstances applicable to each relationship existing between each plaintiff school district and each defendant at a given time. Such a proliferation of dissimilar questions of law precludes satisfaction of the requirements of Rule 23(a)(2).[18]

The typicality requirement is related to the prerequisite that there be common questions of law and fact and similar considerations demonstrate that typicality is lacking in this case. Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class" in order for an action to be maintained as a class action. Fed. R. Civ. P. 23(a)(3). In this case, the claims of the representative parties are specific, unique, uncommon and not "typical".

As stated, the different state laws governing punitive damage awards must be applied under *Erie Railroad* and the independent and separate relationships between each plaintiff and each defendant as to each product at

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18. The Third Circuit was keenly aware of the magnitude and dangers of the task of interpreting and applying numerous state laws, and quoted the observation of one commentator that a very real "danger of . . . mistaken application" of state law exists due to the district court's own unfamiliarity with the intricacies of each state's laws and the "sheer magnitude" of the burden of interpreting various state laws. *School Asbestos Litigation, supra*, 789 F. 2d at 1010 n. 11, *quoting* Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification,* 92 Harv. L. Rev. 718, 742 (1979). Despite this awareness, the Third Circuit failed to consider the related task required under *Erie Railroad* of predicting how each state's highest court would decide questions of first impression when they inevitably arise in these proceedings. In such forays into the realm of uncharted state substantive law, the burden upon the district court and the potential for error is undeniable.

a given time must be analyzed under applicable state laws before any punitive damages may be awarded. In cases where, as here, individual relationships between the parties are unique, typicality is negated.[19]

Moreover, it has been held that typicality is inherently destroyed where, as here, establishment of the individual involvement of each defendant is a key element of plaintiff's burden of proof.[20]

This litigation is very different from other mass tort litigation. The prerequisites of commonality and typicality may be met in cases involving one defendant, one product or one accident. In such cases, common questions of fact and law may be identifiable and the limited scope of the proceeding may enable satisfaction of commonality and typicality requirements. The instant case, with its involvement of numerous parties and products over more than three decades, spawns countless different questions of fact and law and atypical claims brought under different state laws and subject to different defenses available under state law. Thus, it is the very nature of this unique case which precludes satisfaction of the prerequisites of commonality and typicality.

B. Lack of Adequate Representation of Class Interests Required Under Rule 23(a)(4)

Plaintiffs plan to meet the "most stringent test of liability" standard in all applicable categories of state substantive law, ranging from the sufficiency of the pleadings to the burdens of proof and evidentiary criteria applicable to the claims. This proposal immediately ren-

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19. *See, e.g., Beebe v. Pacific Realty Trust*, 99 F.R.D. 60 (D. Or. 1983); *Bogle v. Crow-Brighton Co.*, 96 F.R.D. 1 (W.D. Okla. 1981); *Oakland County Hearing Aide Service v. Sonotone Corp.*, 23 Fed. R. Serv. 2d (Callaghan) 1431 (E.D. Miss. July 22, 1977).

20. *Smith v. Toyota Motor Sales USA, Inc.*, 1977-1 Trade Cas (CCH) ¶61, 252 (N.D. Cal. Jan. 11, 1977) (where numerous car dealers were involved in alleged conspiracy, requirement of proving individual dealer's involvement precluded finding of typicality).

ders inadequate the representation of class interests in this case.

Rule 23(a)(4) requires as a final minimum prerequisite that "the representative parties will fairly and adequately protect the interest of the class." Fed. R. Civ. P. 23(a)(4). The obvious issue is whether the representative parties can fairly and adequately protect the interests of all the absent class members by subjecting all claims to the highest requirements of law at every juncture in the proceedings despite the existence of less rigid standards in different jurisdictions which individual class members would face but for the class certification. The question must be answered in the negative.[21]

Since the requirements for punitive damages change according to jurisdiction, the proposal by the putative class representatives to adhere to the most stringent standards at all times will require some class members to meet standards that would not otherwise apply. The proposal proves the inadequacy of the representation of class interests. *Compare East Texas Motor Freight v. Rodriquez*, 431 U.S. 395, 403-05 (1977).

The proposed adherence to the most stringent requirements of substantive state law violates the *Erie Railroad* strictures against creation of a patchwork quilt of federal common law woven from the substantive laws of each jurisdiction. Although it acknowledged the requirement of applying each state's substantive laws, the Court of Appeals deferred to the plaintiffs' proposal for application of the most stringent state law applicable at each stage of the proceedings, thereby improperly countenancing creation of a federal common law. The putative class representatives cannot fairly and adequately protect the interests of the class by their proposal and Rule 23(a)(4) has not been satisfied.

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21. Celotex raised this consideration parenthetically in its Petition for Writ of Certiorari. *See Celotex Corp. v. School District of Lancaster, petition for cert. filed*, 55 U.S.L.W. 3114 (U.S. July 29, 1986) (No. 86-140), Part IV, at 21 n. 17.

CONCLUSION

Under oft-repeated principles of law, a case may not proceed as a class action unless the prerequisites of Rule 23 have been met. *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982); *East Texas Motor Freight v. Rodriquez*, 431 U.S. 395 (1977). Rule 23 requirements have not been satisfied in this case and these proceedings should be denied class action status. This specific litigation is unique in its involvement of the many different products and the defendants who may have been associated with these different products in numerous ways over several decades. Lacking in these proceedings are the basic, minimum prerequisites for class treatment. The unique nature of this case precludes the existence of any significant common questions of law or fact owing to the broad disparity of products and parties and the varying substantive laws of each jurisdiction. These unique circumstances also preclude satisfaction of the typicality requirement under Rule 23(a)(3) in that each putative member's claim is necessarily atypical. By proposing a most stringent test of liability at all points in this proceeding, the putative class representatives do not fairly and adequately represent the interests of the class and fail to satisfy Rule 23(a)(4).

Certification of a mandatory class for punitive damages under Rule 23(b)(1)(B) would improperly place the cart before the horse. Petitioners assume that plaintiffs have a protectable right to or interest in punitive damages under Rule 23(b)(1)(B) when they do not.[22] Peti-

22. On the contrary, the rationale behind punitive damages punishment and deterrence of the wrongdoer and plaintiffs' interests are not implicated. *See In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*, 521 F. Supp. 1188 and 526 F. Supp. 887, 899 (N.D. Cal.), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). *See also* Restatement (Second) of Tort §908, comment c (1979); 3 H. Newberg, *Newberg on Class Actions* §17.29, at 406-09 (2d ed. 1985).

tioners also fail to comprehend that a class for compensatory damages would first have to be approved. Fibreboard has joined with Celotex and others seeking a review of the Third Circuit's affirmance of a 23(b)(3) class. Any decision on certification of a punitive damages class necessarily depends upon whether a class for compensatory damages is certified. Fibreboard and others seek review of the certification of a 23(b)(3) class for compensatory damages and a reversal of that certification would preclude any punitive damage class.

The very nature of this case, then, militates against satisfaction of Rule 23 requirements and this matter should not proceed as a class action under any subsection of Rule 23. For these reasons, Fibreboard objects to the petitioners' positions on class certification. If both Petitions are granted, Fibreboard requests this Court to affirm the Third Circuit's vacation of certification under Rule 23(b)(1)(B) and to affirm the denial of certification under Rule 23(B)(2) and to reverse the certification of a class under Rule 23(b)(3).

Respectfully submitted,

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No. 86-339

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

NATIONAL GYPSUM COMPANY,
UNITED STATES GYPSUM COMPANY, AND
W. R. GRACE & CO.,
Petitioners,

v.

SCHOOL DISTRICT OF LANCASTER, et al.,
Respondents.

BRIEF OF GAF CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTION

This brief is submitted by GAF Corporation ("GAF"), a defendant in these class proceedings, in opposition to the petition by defendants National Gypsum Company ("National Gypsum"), United States Gypsum Company ("U.S. Gypsum") and W. R. Grace & Co. ("Grace") for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review that portion of the judgment in *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), *reh'g denied* (June 2, 1986)[1] which, *inter alia*, vacated the certification by the United States District Court for the Eastern District of Pennsylvania of a mandatory punitive damages class under Fed.R.Civ.P 23(b)(1)(B) and affirmed the district court's denial of a Fed.R.Civ.P. 23(b)(2) class certification. GAF has joined with defendant Celotex Corporation ("Celotex") and a number of other defendants in a brief in opposition to be filed concurrently with this brief ("the opposition brief of certain defendants") to the instant petition.[2] This brief will address certain arguments advanced by petitioners in support of a Rule 23(b)(1)(B) punitive damage class, but not addressed in the opposition brief of certain defendants.

This case involves three diversity of citizenship, product liability suits which have been consolidated in the United States District Court for the Eastern District of Pennsylvania. The named plaintiff school districts seek to represent a nationwide class of school districts to recover costs allegedly associated with the inspection, testing and abatement of a wide variety of asbestos-containing products in school buildings, plus punitive damages, under several legal theories. Over fifty companies including miners, bulk suppliers, brokers, assemblers, manufacturers and distributors have been named

1. On June 2, 1986 the Third Circuit denied petitions for rehearing and rehearing *en banc* from its May 1, 1986 decision.

2. The arguments advanced in that brief are incorporated herein by reference.

as defendants. In its Pretrial Order No. 20, the district court certified both a voluntary class under Fed. R.Civ.P. 23(b)(3) for compensatory damages and a no opt-out "mandatory class" under Fed. R.Civ.P. 23(b)(1)(B) for punitive damages.[3] The United States Court of Appeals for the Third Circuit ("Third Circuit") vacated the 23(b)(1)(B) class but affirmed the 23(b)(3) class.[4] GAF has joined with Celotex and a number of other defendants in a petition for review of the Third Circuit's affirmance of the 23(b)(3) class.[5]

Of the more than fifty defendants in the instant case only three — National Gypsum, U. S. Gypsum and Grace — and not a single plaintiff — seek this Court's review of the Third Circuit's vacation of the Rule 23(b)(1)(B) class. Rule 23(b)(1)(B) permits the certification of a mandatory class where the prosecution of individual actions would create a risk of:

> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Thus, Rule 23(b)(1)(B) permits a court to certify a mandatory class with a no "opt-out" provision to protect *proposed class members* from individual lawsuits that would impair *class members'* ability to protect their interests. Petitioners completely ignore the expressed purpose of this class and attempt to expand it well beyond its confines. Rather than focus on the interests of proposed class members, petitioners call for a "bold procedural response" to insure "fairness" to petitioners.

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3. *In re Asbestos School Litigation*, 104 F.R.D. 422 (E.D.Pa. 1984).

4. *In re School Asbestos Litigation*, 789 F. 2d 996 (3d Cir. 1986), *reh'g denied* (June 2, 1986).

5. *Celotex Corporation v. School District of Lancaster*, 55 U.S.L.W. 3114 (U.S. July 30, 1986) (No. 86-140).

Thus, petitioners do not argue that the writ should be granted, and consequently the Rule 23(b)(1)(B) class reinstated, to protect the interests of purported class members. Rather, petitioners seek to have this Court eschew the real purpose of Rule 23(b)(1)(B) in the name of a "bold procedural response" for a purported "cost-efficient single adjudication" on multiple punitive damage claims "for the same course of conduct." Petition for Writ of Certiorari at 3, 8 and 12 ("Petition"). GAF certainly agrees that there must, and should, be procedural and substantive due process limits on punitive damage awards. Nonetheless, it is neither the function nor purpose of Rule 23(b)(1)(B) to achieve these laudable goals. Rule 23(b)(1)(B) simply is not the only mechanism and, more importantly, is not the proper mechanism to address these goals. Petitioners, other than through naked conclusions, have not demonstrated why this Court, and not other, more appropriate bodies such as Congress, the Environmental Protection Agency, state legislatures and the lower federal and state courts, is necessary to legislate, rather than adjudicate, solutions which are otherwise inappropriate under Rule 23. Thus, the petition for writ of certiorari should be denied as calling for an unnecessary and improper application of Rule 23(b)(1)(B).

REASONS FOR NOT GRANTING THE WRIT

I. IT IS NOT THE PROPER DOMAIN OF THIS COURT TO LEGISLATE A SOLUTION TO PETITIONERS' PERCEIVED PROBLEMS THROUGH AN UNWARRANTED APPLICATION OF RULE 23(b)(1)(B)

In somewhat melodramatic fashion, petitioners point to problems wrought by asbestos litigation and turn to this Court as providing the last great hope, by imploring that "only this court can provide a nationwide solution to a nationwide problem," Petition at 8, through the application of Rule 23(b)(1)(B). This fundamental

premise of the petition is seriously flawed. In fact, in the context of these proceedings, this Court is not the only body, or even the proper body, and a mandatory Rule 23(b)(1)(B) punitive damage class is not the only, or even proper method, to provide a solution to the problems which petitioners perceive as "nationwide": "[n]umerous and conflicting punitive damage claims, . . . [which] threaten to deprive petitioners of their due process right not to be excessively and repeatedly punished." Petition at 9. Rather, Rule 23(b)(1)(B) should be utilized in proper cases only to further the expressed purpose of that very unusual and limited type of class[6] and not as a means to address "punitive damage overkill." Solutions to this problem can and should be addressed by any or all of a wide range of legislative, executive and judicial bodies: Congress, the Environmental Protection Agency, state legislatures, lower federal courts and state courts, and by this Court in an appropriate proceeding.[7] It is not, and should not be, the prov-

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6. Indeed, petitioners ignore the true purpose of Rule 23(b)(1)(B) and focus instead on the argument that a Rule 23(b)(1)(B) class should be certified on the grounds of "fairness" to petitioners.

7. In fact, Congress and the Environmental Protection Agency have acted already on the school asbestos issue. It could be argued that actions taken by the Environmental Protection Agency and Congress, among others, precipitated this litigation. In 1980, the EPA investigated the presence of asbestos in the nation's schools and promulgated proposed regulations pursuant to the Toxic Substances Control Act, 15 U.S.C. §§2601-2629, requiring every public and private school in the country to test for the presence of asbestos in their buildings. 40 C.F.R. §§763.100-.119 (1983). In addition, Congress enacted the Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. §§3601-3611. Moreover, in June of this year, Senate and House subcommittees approved the Asbestos School Hazard Emergency Response Act of 1986 which would require the EPA to set rules and standards for the proper removal and abatement of asbestos in schools. *See* H.R.5073 and S.2083. On October 1, 1986, the House passed H.R.5073. A vote on this bill is pending before the Senate. N.Y. Times, Oct. 2, 1986, at A15, col. 2.

ince of this Court to relax the rigorous standards of Rule 23 or to legislate a special exemption from those standards for asbestos litigation.

Indeed, the Third Circuit, although thoroughly cognizant of procedural and substantive due process concerns raised by the petitioners, vacated the mandatory punitive damage class. In doing so the Third Circuit noted that in *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985), *cert. denied,* U.S. , 106 S. Ct. 3335 (1986), the Sixth Circuit considered defendant's due process arguments and held that: " ' [a]s a matter of federal constitutional law we believe that the presence of a judicial tribunal before which to litigate the propriety of a punitive damages award provides Johns-Manville with all the procedural safeguards to which it is due.' 776 F.2d at 1571." 789 F.2d at 1004 (App. A-25).[8]

Similarly, in the recent case of *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986), the New Jersey Supreme Court also considered the punitive damage overkill problem, and the manner in which individual courts could safeguard against this problem. The court conceded that it could not implement nationwide solutions to the problem of multiple claims for punitive damages but concluded that reasonable limits could be imposed on the state level by individual courts. Specifically, the court opined:

> [t]hat does not mean, however, that we cannot institute some controls over runaway punitive damages. . . [T]here should be some limits placed on the total punishment exacted from a culpable defendant. We conclude that a reasonable imposition of those limits would permit a defendant to introduce evidence of other punitive damage awards already

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8. All references to the Appendix ("App.") are to the Appendix to the instant petition.

> assessed against and paid by it, as well as evidence of its own financial status and the effect a punitive award would have.
>
> . . . .
>
> When evidence of other punitive awards is introduced, trial courts should instruct juries to consider whether the defendant has been sufficiently punished, keeping in mind that punitive damages are meant to punish and deter defendants for the benefit of society, not to compensate individual plaintiffs.

103 N.J. at 669, 670, 512 A.2d at 480 (citations omitted).

While lower courts have not acted to provide adequate procedural safeguards to date, they have addressed and will continue to address the very real punitive damage problems in the context of individual cases, which would provide a more appropriate context for review by this Court. Thus, while petitioners' concerns regarding due process limitations on punitive damages are well founded, petitioners fail to demonstrate why Rule 23(b)(1)(B) and only Rule 23(b)(1)(B) provides a solution and is otherwise warranted.[9]

It is therefore submitted that it is not the exclusive or proper domain of this Court to supply a "nationwide solution to a nationwide problem" by relaxing the standards of Rule 23 in order to resolve that problem. The Third Circuit has not, as petitioners contend, erroneously foreclosed the use of Rule 23(b)(1)(B) to resolve due process problems posed by punitive damages. The Third Circuit correctly held that on the basis of the record in the instant case it was improper to certify a mandatory punitive damage class, and petitioners have

9. It must be noted with some significance that while all defendants join in petitioners' concerns regarding due process limitations on punitive damages, only three defendants (petitioners) out of over fifty, believe that this unwarranted extension of Rule 23(b)(1)(B) is the only way to address those concerns.

failed to demonstrate why this Court must act to disturb that holding. The Third Circuit's decision on this point should not be reviewed.

II. THE PUNITIVE DAMAGE CLAIMS DO NOT SATISFY THE REQUIREMENTS OF RULE 23(b)(1)(B)

A. The Record Does Not Support A Rule 23(b)(1)(B) Class

The only three federal appellate courts, including the Third Circuit in the instant case, which have considered Rule 23(b)(1)(B) certification on the issue of punitive damages in the context of mass torts have rejected it. *In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 459 U.S. 988 (1983). Thus, since there is no conflict among or confusion in the circuits on this issue, review of the petition is unwarranted.

In addition, the Third Circuit properly decided against a 23(b)(1)(B) certification in this case. The district court had ruled that plaintiffs' claim for punitive damages was appropriate for Rule 23(b)(1)(B) treatment because, "[i]t is apparent that there is a substantial *possibility* that early awards of punitive damages in individual cases will impair or impede the ability of future claimants to obtain punitive damages." *In re Asbestos School Litigation*, 104 F.R.D. at 437 (App.A-77) (emphasis supplied).[10]

The district court had adopted the reasoning of Judge Jack B. Weinstein in *Agent Orange*[11] who had

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10. This rationale has been referred to in these proceedings as the "limited generosity" theory.

11. *In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied sub. nom. In re*

found, using a more rigorous standard, that Rule 23(b)(1)(B) was satisfied because of the "substantial *probability*" that subsequently suing plaintiffs would find their ability to recover punitive damages awards impaired because of due process limits on the amount of times defendants could be punished for their wrongful conduct. 104 F.R.D. at 435 (App. A-72, 73).[12]

At the outset, it is important to note that plaintiffs have no interest in or right to recover punitive damages. Indeed, the sole purpose of punitive damages is to punish and deter the alleged wrongdoer and not to benefit the plaintiff. *See Dalkon Shield.*[13] Accordingly, the school districts do not have the kind of protectable interest that is contemplated by Rule 23(b)(1)(B).

Thus, the district court's mandatory class certification was grounded on the unsupported and irrelevant assumption that potential punitive damage awards might be limited in future individual cases. This conclusion was the product of pure speculation and was without any basis in the record or in law. The Third Circuit observed that the district court had made "no factual findings at all as to the potential amount and scope of punitive damages . . . in sharp contrast to the detailed findings on the subject in *In re Agent Orange Product Liability*

NOTES *(Continued)*

Diamond Shamrock Chemicals Co., 725 F.2d 858 (2d Cir. 1984), *cert. denied sub. nom. Diamond Shamrock Chemicals Co. v. Ryan*, 465 U.S. 1067 (1984).

12. It is significant that Judge Weinstein's conclusion was based, in part, on his finding that "there is a substantial probability that limited punitive damages *may be allowed*." 100 F.R.D. at 728 (emphasis supplied). In the present action, the Third Circuit found that the district court had made no finding as to the likelihood that punitive damages would be awarded against any of the defendants.

13. *In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*, 526 F.Supp. 887, 899 (N.D. Cal., 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

Litigation. . . ." 789 F.2d at 1005, (App. A-25,26) (citations omitted). The Third Circuit found that the "most the district court mustered here was its conclusion that: 'It is apparent that there is a substantial possibility that early awards of punitive damages . . . will impair . . . the ability of future claimants to obtain punitive damages.' " *Id.* The Third Circuit concluded that these bare conclusions "fall short of the mark." *Id.*

The Third Circuit's ruling was eminently justified. If Rule 23(b)(1)(B) could be satisfied in the manner adopted by the district court and now urged by petitioners, *every* class action complaint alleging a claim for punitive damages would automatically satisfy subsection (b)(1)(B). Such a situation cannot have been contemplated by the authors of Rule 23.

Moreover, courts have recognized that a strict standard must be employed to prevent automatic Rule 23(b)(1)(B) certification. In *Dalkon Shield*[14] the Ninth Circuit employed a much more rigorous standard than the "substantial possibility" standard used by the district court below and vacated the certification of a mandatory punitive damages class because the detrimental effect of separate punitive damages awards was not "clearly inescapable." 693 F.2d at 851. The court stated that Rule 23(b)(1)(B) certification would be proper only when "separate punitive damages claims *necessarily* will affect later claims." *Id.* at 852 (emphasis supplied).[15]

Thus, the "substantial possibility" standard employed by the district court in this case suffers from two fatal flaws. First, it is an even weaker standard than Judge Weinstein's "substantial probability" formulation in *Agent Orange* and thereby raises the specter of automatic Rule 23(b)(1)(B) certification in every case in

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14. *In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

15. *See also LaMar v. H & B Novelty & Loan Company*, 489 F.2d 461, 476 (9th Cir. 1973).

which punitive damages are alleged. Second, as found by the Third Circuit, even under the legal standard articulated by the district court, there was no evidentiary foundation or basis for the determination that a possibility exists of potentially limited future punitive damage awards. Accordingly, the Third Circuit was correct in ruling that the requirements of Rule 23(b)(1)(B) have not been met.

B. The Rule 23(b)(1)(B) Class Soug! t By Petitioners Is Underinclusive

Even if the record in the instant case supported the "limited generosity" rationale for mandatory class certification, the present case is inappropriate for a mandatory class treatment because the purported class is underinclusive. This was recognized by the Third Circuit to be a "critical flaw" in the district court's analysis:

> [t]he class certified does not even include all property damage claimants. Claims for repair of municipal buildings, for instance, are omitted, as are those of homeowners.
>
> . . . .
>
> Clearly, however, this aspect of the litigation transcends the nation's classrooms and extends to municipal buildings, homes and other structures.
>
> Far more significant are the tens of thousands of personal injury suits in which punitive damage verdicts have been and continue to be assessed. These claims are satisfied from the same pool of assets to which the school districts now look. If a limit is ever placed on the total punitive damages to be imposed on the asbestos defendants, then that limit probably would apply to all claims whether they arise in property damage or personal injury suits. The school claims would be but a small portion of this total.
>
> . . . .

> Assuming that the record supported the "limited generosity" theory, we would nonetheless decertify the class on the ground that it is underinclusive.

789 F.2d at 1005, 1006 (citations omitted) (App. A-26, 27).

Thus, the Third Circuit reasoned that the class certified by the district court, and now requested by petitioners, was underinclusive, and *would not accomplish what it was certified by the district court to accomplish*, i.e., to insure that the purported class members will share in a limited fund of punitive damages.[16]

Indeed, the Third Circuit concluded that the effect of the mandatory class would be

> to single out the school districts for special and possibly disadvantageous treatment.
>
> . . . .
>
> Since the thousands of other claimants who seek exemplary damages from the asbestos defendants need not operate within the confines of a mandatory class procedure, the quest for punitive damages remains for them a race to the courthouse door. Consequently, if the district court proves correct in its theory that at some point a limit on all punitive damages will be established, the school districts may be prejudiced in their opportunity to share in the available funds in the meantime.

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16. Petitioners argue, disingenuously, that the Third Circuit's discussion of the "underinclusiveness" of the proposed Rule 23(b)(1)(B) class has little or no application to petitioners' arguments. Petitioners cleverly ignore the fact that the underinclusiveness issue is very relevant to the primary basis upon which the district court certified the Rule 23(b)(1)(B) class — the "limited generosity" theory. The Third Circuit properly reasoned that the underinclusiveness of the purported class precluded accomplishing the objectives which formed the basis for the district court's certification.

. . . .

> *Certification of a punitive damage class under that provision* [Rule 23(b)(1)(B)] *here will not accomplish these objectives.* In the court's pursuit of an end that is not attainable, the class designed to be protected will be burdened with hardships not imposed on any other litigants.

789 F.2d at 1006 (App. A-29) (emphasis supplied).

It is submitted that the Third Circuit's analysis was proper and that the instant petition should be denied. The district court's reliance upon a "limited generosity" theory to support the proposed mandatory punitive damage class was misplaced. The Third Circuit correctly ruled that that theory was not a proper ground for certifying a mandatory punitive damages class because such a class would be underinclusive.

C. A Mandatory Class Will Delay Disposition For Defendants Of The Claims Of Individual Class Members

There is another reason, recognized by the Third Circuit, militating against the certification of a mandatory punitive damages class. The Third Circuit stated this rationale as follows:

> [a] class action may promote efficiency by reducing repetitive testimony and evidence that otherwise would be required in individual trials. Those advantages, however, are secured at the price of delaying the disposition of individual cases that might be tried to conclusion in a number of state and district courts in the interim. In effect, a mandatory class action creates a bottleneck by concentrating the litigation, at least for a period, before one judge instead of spreading the individual cases out among many trial forums.

789 F.2d at 1007 (App. A-30, 31).

In addition, this Court has recognized that individual case adjudications can be of great value as an alternative to a mandatory nationwide class because:

> nationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges, and, of increasing, in certain cases, the pressures on this Court's docket. It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts. For this reason, a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, *and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts.*

Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (emphasis supplied).

Therefore, any theoretical benefit which might flow from having a "single adjudication in a single forum" is completely outweighed by the bottleneck which a mandatory class would create in the Eastern District of Pennsylvania, and the attendant delay caused defendants, as well as all parties, in having these cases heard expeditiously.

D. The Required Application Of The Varying Laws Of The Fifty States Renders Any Class Inherently Unmanageable

The Third Circuit recognized that in diversity cases, courts are bound by *Erie*[17] to apply state substantive law and "the dictates of state law may not be buried under the vast expanse of a federal class action. The parties'

17. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

rights under state substantive law must be respected, and if that is not possible in a class action, then that procedure may not be used." 789 F.2d at 1007 (App. A-31). The Third Circuit reasoned that because the "limited generosity" concept is based upon state law, the lack of uniformity among the states in applying that concept rendered certification improper. On this point the court stated: "[n]othing in the record supports the expectation that a substantial number of states will adopt the "limited generosity" theory in the foreseeable life of this class action. . . A *mandatory class should not be certified on the basis of a prospect so questionable at this time.*" *Id.* (App. A-31, 32) (emphasis supplied).

Moreover, in addition to the uncertainty over the uniform application of the "limited generosity" theory, the court trying the claims of a mandatory punitive damage class in this diversity case would have to evaluate each individual class member's claim for punitive damage in the context of the state punitive damage law applicable to that class member.[18] Consequently, if a "mandatory" punitive damage class is certified, there would be an unmanageable quagmire of thousands of individual claims requiring individual proof. Legal issues and defenses differ from state to state and thus will require lengthy hearings. It is not inconceivable that punitive damages will be determined on a state by state, plaintiff by plaintiff, building by building, defendant by defendant basis. Thus, any purported efficiency to be gained from "a single adjudication of liability in a single forum," would be totally eliminated by the bottleneck that a mandatory class action would create by concentrating the litigation before one judge instead of spreading the individual cases out among many trial courts.

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18. This analysis would have to take place, of course, after the court had resolved any conflicts of law issues as to which state's law to apply to any given claim.

III. A MANDATORY CLASS ON THE ISSUE OF PUNITIVE DAMAGES VIOLATES THE FEDERAL ANTI-INJUNCTION ACT

This Court has stated that the Anti-Injunction Act[19]:

> is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of the three specifically defined exceptions.
>
> . . . .
>
> . . . Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of §2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.

Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286, 297 (1970)[20].

There are numerous actions brought by individual school districts now pending in state courts throughout the country which seek punitive damages. Since all school districts would be bound by the Rule 23(b)(1)(B) certification, such a certification would effectively enjoin the litigation of punitive damage claims in all individual actions.

In the only circuit court decision to have considered the interplay of the Anti-Injunction Act and mandatory

19. The Federal Anti-Injunction Act provides:
A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.
28 U.S.C. §2283.

20. *Accord Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977).

class certification, *Federal Skywalk*,[21] the Eighth Circuit vacated a Rule 23(b)(1)(B) class certification as a patent violation of the Anti-Injunction Act because of the pendency of numerous state court actions. The court stated: "the substantial effect of the order also enjoined the state plaintiffs from pursuing their pending state court actions on the issues of liability for compensatory and punitive damages and the amount of punitive damages." *680 F.2d* at 1180.

Precisely the same result is mandated here. The effect of a Rule 23(b)(1)(B) certification is to prevent the various individual plaintiffs from pursuing claims for punitive damages.

The district court below adopted the view of the *Skywalk* dissent in holding that the second of the three statutory exceptions to the Anti-Injunction Act, *i.e.*, the "necessary in aid of jurisdiction" exception, applied to the present case. 104 F.R.D. at 436 (App. A-74).[22]

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21. *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 465 U.S. 1067 (1984).

22. The other two exceptions are inapplicable to the mandatory class certification urged by petitioners. As to the first of the three exceptions, there is no federal statute "expressly authorizing" the stay of state court proceedings as to punitive damage claims by school districts. Indeed, the Third Circuit held in *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975), that Rule 23 is not an exception to the Anti-Injunction Act. *Id.* at 781.

As to the third exception, certification of a mandatory class is not necessary to protect or effectuate the federal court's judgment. The purpose of this exception is to prevent "relitigation of cases and controversies fully adjudicated by [the federal] courts." H.R. Rep. No. 308, 80th Cong. 1st Sess., 1949, pp. A181-A182. *See* 17 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, §§4221 and 4226 (3d ed. 1978). Since this litigation is in its initial stages, no such danger is present. Further, "[i]t is clear that this [exception] does not permit a federal court to enjoin state proceedings to protect a judgment that the federal court may make in the future but has not yet made." 17 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, §4226 (3d ed. 1978).

This ruling was legal error. This Court has narrowly construed this exception, holding that an injunction may be justified only if it is "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line R.R., supra*, 398 U.S. at 295.[23]

Such is not the case here. In fact, this Court specifically held in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) "that *in personam* actions in federal and state court may proceed concurrently, without interference from either court" in suits involving the same subject matter. [24] *Vendo* is, therefore, fatal to any argument that this case falls within the second exception because this litigation also involves parallel state and federal actions concerning the same subject matter.

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23. *See also In Re Glenn W. Turner, supra*, 521 F.2d at 780; *Federal Skywalk, supra*, 680 F.2d at 1182-83.

24. *See Skywalk, supra*, 680 F.2d at 1182-83; 17 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, §4225 (3d ed. 1978).

CONCLUSION

For the reasons set forth above, the Third Circuit's decertification of a mandatory Rule 23(b)(1)(B) class on the issue of punitive damages should not be disturbed or reviewed and this Court should deny the Petition of National Gypsum Company, United States Gypsum Company and W. R. Grace & Co. for a Writ of Certiorari.

Respectfully submitted,
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October 3, 1986

RULE 28.1 STATEMENT

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondent makes the following statement disclosing parents, non-wholly owned subsidiaries and affiliates:

GAF Corporation:

None.